REDACTED FOR PUBLIC INSPECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 251(d)(1) in the Anchorage LEC Study Area	WC Docket No. 05-281

OPPOSITION OF GENERAL COMMUNICATION, INC. TO THE PETITION FOR FORBEARANCE FROM SECTIONS 251(c)(3) AND 252(d)(1) OF THE COMMUNICATIONS ACT FILED BY ACS OF ANCHORAGE

Tina Pidgeon
Vice-President –
Federal Regulatory Affairs
General Communication, Inc.
1130 17th Street, N.W., Suite 410
Washington, D.C. 20036
(202) 457-8812

John T. Nakahata
Brita D. Strandberg
Bruce L. Gottlieb
Christopher P. Nierman
Harris, Wiltshire & Grannis LLP
1200 Eighteenth Street, N.W.
Washington, D.C. 20036
(202) 730-1300

Counsel for General Communication, Inc.

Filed: January 9, 2005

SUMMARY

General Communication, Inc. ("GCI") is a competitive LEC that has brought the enormous benefits of retail competition to Anchorage consumers, just as Congress intended when it created the 1996 Act. By purchasing and installing its own switch and transport facilities, and by providing superior customer service and new consumer choices, GCI has been able to capture a significant percentage of existing retail customers, which has in turn allowed state regulators to substantially deregulate retail prices. But all of this success has rested – and continues substantially to rest – on GCI's ability to reach its customers over UNE loops owned by ACS of Anchorage, Inc. ("ACS"), the incumbent LEC. For instance, GCI at the present time serves nearly 70% of its existing switched voice lines using ACS facilities, predominantly UNE loops. Today, GCI is working as quickly as possible to deploy its own last-mile facilities where it is economically feasible to do so and is as eager as anyone to reduce its reliance on ACS's loops. Nevertheless, that process is far from complete.

Now, even before GCI has reached the "end of the beginning" of its construction of last-mile facilities, ACS seeks forbearance from the unbundling provisions – sections 251(c)(3) and 252(d)(2) – that form the core of the 1996 Act and the backbone of local competition in Anchorage. ACS claims forbearance is warranted because of GCI's great success in bringing the benefits of retail competition to the Anchorage local markets. But the fundamental flaw in ACS's reasoning is its failure to recognize or acknowledge that retail competition in Anchorage exists today *because* of the continued existence of the loop unbundling provisions. Indeed, as explained below in greater detail, it is quite clear that ending loop unbundling in Anchorage would stifle the very retail competition that

has so greatly benefited consumers and that forms the basis for ACS's Petition in the first place.

The Commission recently addressed similar issues in resolving Qwest's petition for forbearance from the Act's unbundling provisions in the Omaha MSA. Even though intermodal loop competition appears far more advanced in Omaha than in Anchorage, and Qwest's principal competitor was apparently far less dependent on use of unbundled loops, the Commission declined to provide anything approaching the relief that ACS seeks here. Instead, the Commission made clear that the statutory standards for forbearance require the incumbent LEC to continue to make unbundled loops available at regulated prices (in that case pursuant to Section 271, which is not applicable here) and to continue to do so at cost-based TELRIC rates (pursuant to Sections 251 and 252) in areas where competitors have not yet been able to build or upgrade their own loops substantially. Granting ACS the relief it seeks in Anchorage – relief from *any* unbundling obligation and *any* pricing standard – would accordingly turn the logic of the Commission's Omaha decision on its head. Indeed, after careful consideration of the issue in both the *Triennial Review Remand Order* and the Omaha decision, it remains true that the Commission has never released an incumbent LEC from the obligation to provide competitors with access to unbundled loops at regulated prices.

ACS's Petition contains a number of serious omissions and oversimplifications. To begin with, ACS has simply failed to make any case whatsoever for forbearance from UNEs other than DS0 loops. Nor has ACS properly recognized that the Anchorage product market must at least be separated into the markets for (1) residential customers (2) small businesses, and (3) medium to large enterprises, and it ignores entirely the geographic variations in alternative facilities that the Commission found important in the *Omaha Forbearance Order*. Most importantly, ACS has completely ignored the well-recognized vertical effects that would follow from a grant of virtually unlimited control over an input (unbundled loops) that is necessary to the continued viability of ACS's principal competitor. This control over a bottleneck facility would give ACS the ability to raise GCI's costs and, in consequence, to collect monopoly rents from Anchorage consumers – the antithesis of just and reasonable rates.

In light of the entirely predictable effects of granting ACS the relief it seeks, the Commission must conclude that ACS's Petition, even as to DS0 loops, fails each of the three prongs of the statutory test for forbearance. *First*, the unbundling rules remain necessary to prevent ACS from obtaining the ability to raise its rivals' costs, which would in turn lead to unjust, unreasonable, and discriminatory prices at both the wholesale and retail level. *Second*, the unbundling rules remain necessary to protect consumers for the same reason. *Third*, forbearance is plainly not in the public interest because, as the recent Omaha decision explained, the costs of loop unbundling are justified where competitors have not yet been able to construct loop facilities and the legacy elements in question have already been built and paid for. The Commission accordingly must deny ACS's Petition.

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 251(d)(1) in the Anchorage LEC Study Area	WC Docket No. 05-281

OPPOSITION OF GENERAL COMMUNICATION, INC. TO THE PETITION FOR FORBEARANCE FROM SECTIONS 251(c)(3) AND 252(d)(1) OF THE COMMUNICATIONS ACT FILED BY ACS OF ANCHORAGE

General Communication, Inc. ("GCI") opposes the petition for forbearance from Sections 251(c)(3) and 251(d)(1) of the Communications Act of 1934 in the Anchorage LEC study area filed on September 30, 2005 by ACS of Anchorage, Inc. ("ACS"). ACS's Petition relies in large part on GCI's substantial retail market presence, without acknowledging the critical role that unbundled network element ("UNE") loops – made available pursuant to Sections 251(c)(3) and 252(d)(2) – continue to play in allowing GCI to maintain its retail market presence. Further, ACS seeks far *greater* unbundling relief than the Commission granted in its recent *Omaha Forbearance Order*,[1] even though Anchorage is far *less* mature than Omaha in terms of loop competition and dependence of the ILEC's principal competitor on UNE unbundling. Permitting such a result would turn the logic of the *Omaha Forbearance Order* on its head. Granting the forbearance ACS

[1] *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, WC Docket No. 04-223 (rel. Dec. 2, 3005) ("*Omaha Forbearance Order*").

seeks would enable ACS to raise its rivals' costs and lead directly to higher, unjust, and unreasonable prices and restricted choices for Anchorage's residential and business consumers. ACS's petition accordingly fails each of the three prongs of the statutory test for forbearance and, therefore, must be denied.

I. INTRODUCTION AND SUMMARY

Anchorage, Alaska is a shining example of the success of the local competition policies Congress adopted in the Telecommunications Act of 1996. When Congress opened local markets to competition through the 1996 Act, GCI capitalized on the new opportunities created by Congress and significantly increased its facilities investment and accelerated its entry into local telephone markets – purchasing and installing its own switch, collocating at each of the ACS central office switches, and developing its own metropolitan area fiber transport facilities. As Congress envisioned, by leasing unbundled loops and combining them with its own switching and transport facilities, GCI was able to enter the local telephone market in direct facilities-based competition with the Anchorage Telephone Utility ("ATU") and its successor, ACS.[2] GCI's entry into the market brought and continues to bring substantial benefits to Anchorage customers in the form of lower prices, better service, and increased choice.

Continuing the progression Congress envisioned, GCI is now working as quickly as possible to deploy its own last-mile facilities where it is economically feasible to do so. But GCI's transition to full-facilities based competition is hardly complete – it is

[2] GCI's entry into Fairbanks and Juneau was stalled for several years because of legal battles over whether ACS's rural exemption should be lifted in those areas to permit GCI to gain access to unbundled loops. GCI was able to enter the Anchorage markets without first fighting this battle because ACS of Anchorage is not a rural telephone company under the Communications Act.

closer to the "end of the beginning" than the "beginning of the end." Certainly, there is no basis for ACS's bald and largely unsupported assertion that GCI could complete the transition in a matter of months presumably by flipping a switch or spending some money.

Indeed, the transition process is at an especially fragile point right now because although there is genuine competition at the retail level, ACS continues to be in sole possession of a last-mile connection to the vast majority of Anchorage residences and businesses. Today, GCI leases ACS facilities to serve almost 70% of its switched voice lines and over **[BEGIN CONFIDENTIAL][END CONFIDENTIAL]** of the locations it serves using non-switched DS1 circuits. This means that GCI – and retail competition in Anchorage – still depends extensively on GCI's access to its principal competitor's legacy facilities at regulated rates. And it means that the unbundling relief that ACS seeks would allow ACS to strangle both retail and wholesale competition in Anchorage by leveraging its control over last-mile facilities into higher prices and reduced choice for Anchorage consumers. As the Commission explained in the *Omaha Forbearance Order*, "[g]ranting … forbearance from the application of Section 251(c)(3) on the basis of competition that exists only due to Section 251(c)(3) would undercut the very competition being used to justify the forbearance, and we decline to engage in that type of circular justification."[3]

Specifically, if the obligation to lease UNE loops to GCI at cost-based rates were removed tomorrow, the current level of retail competition in Anchorage would evaporate. Most likely, ACS would simply refuse to sell unbundled loops to GCI at any price –

---

[3] *Omaha Forbearance Order* ¶ 68 n.185.

giving it monopoly control over the large areas and customer segments of Anchorage where GCI cannot provide service over its cable plant and inflicting substantial and long-lasting competitive damage to GCI's brand. Even if ACS chose to offer unbundled loops on a tariffed basis, it would do so only at supracompetitive rates designed to force GCI to raise its retail rates. The practical result for consumers would be the same as if ACS did not offer the unbundled loops at all – the prevailing retail price would be a monopoly price. Indeed, GCI would not only risk loss of its current market share, but also be prevented from moving ahead with its plan to upgrade its cable plant in order to bring true intermodal competition to Anchorage. In effect, forbearance would return much of the Anchorage local markets to their pre-1996 state – except this time without many of the state retail regulations designed to protect consumers from ACS's market power.

The applicable legal standard for forbearance thus makes plain that the Commission should deny ACS's Petition. As an initial matter, the Commission may summarily dispense with much of ACS's request for relief, as the Petition offers only the most cursory – and wholly insufficient – support for forbearance from unbundling of sub-loops, NID, inside wire, 911 access facilities, OSS, DS1 loops, and high-capacity loops and dark fiber. The Commission may similarly dispense with any arguments that the *Omaha Forbearance Order* so much as suggests forbearance here. In that decision, the Commission carefully explained that it was not addressing markets like those in Anchorage where competition has arisen through use of UNE loops. Likewise, that *Order*'s reasoning specifically counsels against granting ACS the complete relief from UNE availability and pricing requirements that it seeks, as the Commission there left in place obligations that Qwest make loops available, in every wire center, under Section

271 at regulated rates – obligations that do not apply to ACS as an independent, non-BOC local exchange carrier.

ACS's request for forbearance also obscures the harm forbearance would cause to consumers in all markets by ignoring the distinctions between product and geographic markets in Anchorage, and the operational, technical, and economic obstacles to serving certain markets without access to UNEs. ACS likewise fails to offer any argument that counters GCI's showing that granting ACS's requested relief from UNE availability and pricing requirements will enable ACS to raise rivals' costs and subject retail consumers in all markets to unjust and unreasonable monopoly rates. Finally, the public interest supports continued application of unbundling obligations in all Anchorage markets, as GCI does not require additional incentives to deploy its own last-mile facilities and competition for those last-mile facilities is still emerging. Because ACS has failed to carry its burden with respect to each prong of the forbearance test, its Petition must be denied.

II. UNE LOOP COMPETITION HAS BROUGHT SUBSTANTIAL BENEFITS TO ANCHORAGE RESIDENTIAL AND BUSINESS CONSUMERS.

The availability of UNE loops at TELRIC rates has benefited consumers by fostering vigorous competition throughout Anchorage and across retail product markets. As detailed below, these benefits include innovative offerings, better customer service, and competitive prices. As a result of this retail competition, and without opposition from GCI, the Regulatory Commission of Alaska ("RCA") is poised to grant ACS substantial relief from retail pricing restraints – the only relief that the existing level of competition in the Anchorage markets arguably warrants.

A. GCI's UNE-Based Competition Brings Consumers Innovative Products, Services and Options.

GCI entered the Anchorage local exchange markets shortly after Congress passed the 1996 Act.[4] From the start, GCI distinguished itself from ACS by offering competitive prices and bundles of popular services.[5] Customers in all Anchorage markets have since consistently chosen GCI. GCI serves approximately **[BEGIN CONFIDENTIAL][END CONFIDENTIAL]** of residential and **[BEGIN CONFIDENTIAL][END CONFIDENTIAL]** of business switched voice lines in Anchorage markets.[6] But GCI's presence in the Anchorage markets has not benefited only GCI's customers. Instead, GCI's innovations and improvements have forced ACS to improve its own products and services.[7]

GCI's presence in Anchorage markets has brought numerous benefits to consumers in the form of new features, better service, innovative product bundles, and substantial price reductions. To list just a few examples:

- GCI entered the Anchorage residential product market in 1997 with the GCI "Value Package," which included basic dial tone plus two of the most frequently used calling features – Caller ID and Call Waiting – for 60% of the price charged by ACS. Through the years, GCI has continued to add features and flexibility to its local telephone service package options.[8]

- GCI offers innovative service packages that include combinations of local, long distance, and wireless telephony, and high-speed broadband and

[4] Declaration of Gina Borland ¶¶ 18-21 ("Borland Decl."), attached hereto as Exhibit A.

[5] Declaration of Dana Tindall ¶¶ 4-18 ("Tindall Decl."), attached hereto as Exhibit B.

[6] Declaration of William Zarakas ¶ 17 ("Zarakas Decl.), attached hereto as Exhibit C; Exhibit III, attached thereto.

[7] Tindall Decl. ¶¶ 4-18.

[8] *Id*. ¶ 4.

digital television service. Customers also have the flexibility to choose additional features and combine them with GCI's service packages.[9]

- After installation of its Anchorage Lucent 5E switch, GCI used UNE loops to offer services to allow customers to better filter their phone calls, including Selective Call Forwarding, Selective Call Acceptance, Selective Call Rejection, and Selective Distinctive Alert.[10]

- GCI has introduced telephone service packages tailored for business customers, and offered products, such as Fast Track Primary Rate ISDN, designed to make high-capacity services affordable and scalable for the small business customer.[11]

- Responding to the seasonal nature of much of Anchorage's business community, GCI has developed products, such as Flexible Digital Subscriber Service, that give business customers greater flexibility to make seasonal adjustments to their ordered services.[12]

- GCI offers businesses total solutions for their communications requirements and provides comprehensive packages tailored to specific business needs, including long distance phone service, local phone service, cellular service, data communications, Internet, network design, commercial cable television, and cable advertising.[13]

- GCI has informed consumers about available services and made those services more affordable, increasing their adoption by consumers. For example, GCI provided customers with free Caller ID boxes and offered Caller ID service at a reasonable price, driving Anchorage-wide adoption of this now ubiquitous service.[14]

- GCI charges its customers less for comparable services, does not charge activation fees for new service, and has reduced the burden of termination penalties for term contracts by releasing customers from those contracts if GCI fails to match a competitor's offer.[15]

---

[9] *Id.* ¶ 7.

[10] *Id.* ¶ 6.

[11] *Id.* ¶ 8.

[12] *Id.* ¶ 10.

[13] *Id.* ¶ 11.

[14] *Id.* ¶ 9.

[15] *Id.* ¶¶ 12-16.

- GCI has made it easier for consumers to visit customer service sites by opening additional sites and extending their hours.[16]

ACS has repeatedly responded to these competitive pressures by improving its own offerings, pricing and customer service in order to match GCI. Notably, in geographic areas where GCI does not compete with ACS, ACS has not made similar efforts – failing, for example, to offer the same types of bundled services that it makes available in Anchorage.[17] Thus, by forcing ACS to compete for customers, GCI's entry into the market through UNE loops has increased choice, decreased prices, and improved service for all Anchorage consumers.

B. UNE-Based Competition Allowed the Market to Discipline ACS's Attempts to Exercise Retail Market Power.

The Commission need not speculate about the ability of UNE-based competition to discipline the retail market and protect consumers. In November 2001, shortly after acquiring ATU, ACS sought and received permission from the RCA to raise its rates for retail residential telephone service by 24%.[18] Then (as now) ACS had two competitors in the local telephone market – GCI and AT&T Alascom.[19] Unlike GCI, which predominantly leased UNE loops and combined those loops with its own switching and transport, AT&T Alascom provided local telephone service solely by reselling ACS local service.[20] As a resale carrier whose cost for wholesale ACS service was set based on

[16] *Id.* ¶ 14.

[17] *See* Exhibit DT1, attached to Tindall Decl.

[18] Tindall Decl. ¶ 13; Borland Decl. ¶ 47.

[19] Borland Decl. ¶ 5.

[20] *Id.*

ACS's retail rate, AT&T Alascom was forced to increase its prices to mirror the increased rates it was charged by ACS.[21]

GCI, by contrast, did not raise its local telephone rates.[22] As a carrier relying predominantly on cost-based UNEs, GCI's costs were independent of ACS's retail prices, and ACS's increased retail prices therefore did not automatically increase GCI's costs.[23] Faced with ACS's price increase, consumers flocked to GCI. ACS was eventually forced to respond by bundling local services and calling features, effectively reducing its rates. Absent the competition from GCI made possible by GCI's access to UNE loops at TELRIC rates, Anchorage consumers would have had no alternative to ACS's draconian rate increase. There can be no clearer demonstration that resale of ACS retail services alone will not enable true competition in Anchorage.

ACS's Petition does not deny the foregoing account of how GCI "kept [ACS's] rates in check."[24] Instead, it attempts to transform this plain example of the consumer benefits of UNE-based competition into a lesson about (1) Anchorage consumers' eagerness to switch providers in order to receive a lower price (*i.e.*, high demand elasticity) and (2) GCI's ability to quickly accommodate new customers (*i.e.*, high supply elasticity).[25] But ACS fails to acknowledge both that consumers had alternatives in 2001

---

[21] Tindall Decl. ¶ 13.

[22] Borland Decl. ¶ 47.

[23] *Id.*¶ 47.

[24] *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(2) and 252(d)(1) in the Anchorage LEC Study* Area, WC Docket No. 05-281, at 38-39 (filed September 30, 2005) ("ACS Petition"). Indeed, ACS concedes that after it raised prices, "GCI began signing up local customers at twice the rate that it had been." *Id.*

[25] *Id.*

when ACS raised its prices and that GCI was able to accept new customers that chose GCI only *because* of UNEs.[26] Without the last-mile access that UNEs provide, GCI could not counter a comparable price increase by ACS today. Consumers in most parts of Anchorage would instead face no alternative but to pay the higher prices that ACS might demand. Indeed, elsewhere in its Petition, ACS concedes that "the benefit of [UNE-based] competition has been that most Anchorage customers, businesses and residences, have a choice of facilities-based providers."[27] Of course, ACS does not go on to point out the corollary: If the Commission gets rid of UNE-based competition, as ACS asks, then most Anchorage customers will cease to have a choice of facilities-based providers.

C. UNE-Based Competition Has Allowed the RCA to Adopt Rules to Substantially Deregulate Retail Rates.

The retail competition that has developed as a result of GCI's access to UNE loops in Anchorage has allowed the RCA to substantially deregulate the Anchorage market. On August 5, 2005, the RCA adopted rules that permit ACS to petition to be declared a non-dominant carrier in Anchorage with respect to its retail services. ACS has now petitioned for this relief, and GCI has not opposed ACS's request. When the RCA grants this petition, ACS will be free to raise or lower any of its retail rates, including all rates for bundled service packages, and for new and repackaged services. The sole exception will be standalone offerings of basic local telephone service to residential and single-line business users. To ensure an orderly transition to market rates, ACS will be permitted to increase the standalone basic service rate by 8% per year through the year

---

[26] Declaration of David Sappington ¶¶ 88-90 ("Sappington Decl."), attached hereto as Exhibit D.

[27] ACS Petition at 14.

2010, at which time all caps on the standalone basic residential and single line business rate will be eliminated.[28] With the adoption of these rules, and once it grants ACS retail non-dominant status, the RCA will have substantially deregulated Anchorage retail rates.

This retail market relief is the only relief warranted by the current state of competition in Anchorage. As discussed below, ACS supports its plea for forbearance primarily by pointing to GCI's share of the retail market, and fails to demonstrate that competition – or self-provisioned alternatives to ACS facilities – currently and sufficiently exists in the wholesale market. To the extent that the facts presented by ACS warrant any regulatory relief, therefore, it must be confined to the retail market and does not logically justify relief from the unbundling requirements in Sections 251(c)(3) and 252(d)(1).

III. ANCHORAGE RETAIL COMPETITION DEPENDS SUBSTANTIALLY ON UNE LOOPS, OVER WHICH ACS RETAINS SUBSTANTIAL MARKET POWER.

Because GCI strongly prefers not to rely on its principal competitor in order to deliver service, GCI has constructed (and continues to construct) its own facilities as quickly as possible – and in far less time that it took ACS and its predecessors to build out its ubiquitous network.[29] The loop facilities that GCI leases from ACS nonetheless remain essential to GCI's provision of Anchorage-wide retail service to the residential small business, and medium to large enterprise markets. GCI relied on UNE loops to offer service and build a local customer base in the years before equipment and

[28] This regulatory change has significant consequences for GCI as well, as it too will be subject to these limits on increases in standalone basic service rates. As a result, should the Commission grant ACS's Petition, GCI could be trapped between ACS's ability to raise the rates it charges GCI and GCI's inability to pass those increases on to customers. *See generally* Section III.F below.

[29] *See generally* Borland Decl. ¶¶ 11-17. GCI has already made substantial process in a much shorter time than the many decades over which ACS's network was constructed.

technology developments enabled GCI to use its cable plant for high quality voice service. Today, GCI continues to rely on ACS loops to serve customers as it makes the changes to its existing facilities necessary to self-provision voice service. Even when GCI completes the many steps necessary to provide voice over its cable plant, however, it will be forced to rely on ACS to provide service in the areas that are not passed by GCI facilities and to provide service to businesses and multiple-dwelling units that cannot be effectively served from GCI's cable plant.[30]

A. GCI Relies on Unbundled Loops to Provide Competitive Services to Residential, Small Business, and Medium and Large Enterprise Customers.

ACS has overwhelming control of the markets for last-mile facilities in Anchorage. This control extends across the residential, small business, and medium to large enterprise markets,[31] and across each wire center in the Anchorage study area.

[30] As discussed in greater detail below, the Commission has concluded that CMRS and VoIP are not substitutes for wireline local voice service of the sort provided by GCI, ACS, and other competitors. *See* Section IV.C.3 below. This conclusion is *a fortiori* correct as applied to Anchorage, as the largest VoIP providers (Vonage (http://vonage.com/avail.php?lid=nav_avail), Verizon VoiceWing (https://www22.verizon.com/ForYourHome/VOIP/Order/CallingAreaSelection.aspx), AT&T CallVantage (https://www.callvantage.att.com/signup/ServiceAvailabilityLite?soac=69717), Packet8 (http://www.packet8.net/store/index.asp?mode=&pg=products&specific=jnnodpo0), and Sunrocket (https://www.sunrocket.com/sign_up/availability/viewAvailabilityMap.do) do not offer Alaska phone numbers. No VoIP provider may offer an integrated VoIP service that can receive locally dialed calls in Anchorage without Anchorage numbers. *See* also Sappington Decl. ¶¶ 106-107. Moreover, the fact that ACS may be losing minutes to wireless carriers, even if true, proves nothing because ACS is itself a leading wireless carrier in Anchorage.

[31] As the Commission has explained, "because the services offered to mass market customers may not be adequate or feasible substitutes for services offered to business customers," treating the residential and business services markets as a single market is "unworkable." *Omaha Forbearance Order* ¶ 21. In Anchorage, as elsewhere, business customers typically demand products and services that are distinct from those sought by residential customers. Borland Decl. ¶ 4.

Because each product market presents distinct economic and technological characteristics, the Commission should disregard ACS's unsupported and oversimplified assertion that "[b]ecause the Anchorage LEC market is small, the distinction between mass market and enterprise loops is irrelevant."[32] In fact, contrary to ACS's view, the size of the Anchorage LEC market bears no relation to the number of distinct product markets. As the *Omaha Forbearance Order* properly concluded, the relevant question is whether "the services offered to mass market customers [are] … adequate or feasible substitutes for services offered to business customers."[33] Here, it is clear that there are at least three distinct groupings of products, none of which are adequate or feasible substitutes for the other.[34]

The first product market is composed of residential users, who require one or more traditional single line POTS lines. Both GCI and ACS market their residential products separately from their business products.[35] GCI currently relies on ACS facilities (either leased UNE loops or resale) to provide service to **[BEGIN CONFIDENTIAL] [END CONFIDENTIAL]** of its lines to residential customers across Anchorage.[36]

This product market is served across multiple geographic markets in Anchorage, not just the single geographic market asserted by ACS. As the Commission has recognized and Dr. Sappington points out, the appropriate geographic market for local exchange and exchange access services is each residential customer's location, but it is

---

[32] ACS Petition at 12; *see generally* Section IV.B. below.

[33] *Omaha Forbearance Order* ¶ 21.

[34] *See generally* Sappington Decl. ¶¶ 32-39, 108-112.

[35] *See* www.gci.com (distinguishing "For Home" from "For Business" and www.acsalaska.com (distinguishing "personal" and "business").

[36] Zarakas Decl. ¶ 18 and Exhibits I and V, attached thereto.

appropriate to treat as a geographic market "an area in which all customers . . . likely face the same competitive alternatives" for the product in question.[37] That is clearly not the case in Anchorage.

As Dr. Sappington explains, competitive conditions vary considerably in different regions of Anchorage, even within individual ACS wire centers, for at least three reasons. First, GCI's cable plant – on which ACS principally relies in making its case for forbearance – is not present throughout the ACS study area. Indeed, GCI's certificated LEC service area, which is coextensive with ACS's study area, is larger than GCI's certificated cable service area.[38] For example, GCI is not the certificated cable provider in Girdwood, which receives cable service from Eyecom, an affiliate of another Alaska ILEC.[39] Second, GCI's network and cable nodes have been upgraded as necessary to provide voice service and necessary back-up power in some parts of Anchorage but not in

---

[37] *Application of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, For Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries*, File No. NSD-L-96-10, Memorandum Opinion and Order, 12 FCC Rcd 19985, 20017 (¶54) (1997) ("*NYNEX-Bell Atlantic Order*"); Sappington Decl. ¶ 35. *See also SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, FCC 05-183 (¶ 97) (rel. Nov. 17, 2005) ("*SBC-AT&T Order* "); *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75, FCC 05-184 (¶ 98) (rel. Nov. 17, 2005) ("*Verizon-MCI Order*").

[38] *See* Exhibits E and F, attached hereto. ACS has recently conducted ex parte meetings that allege "the existence of significant facilities-based competition for local exchange services in the Anchorage market" and submitted a map purporting to show the location of customers served by GCI over its cable telephony facilities. Ex Parte Letter from Elizabeth Park of ACS of Anchorage, Inc. to Marlene H. Dortch, WC Docket No. 05-281 (filed Oct. 20, 2005). This crudely-drawn map fails to disclose even basic information such as the fact that GCI's certificated LEC service area is larger than the footprint of its cable plant. More importantly, it contains an insufficient level of detail to show GCI's coverage on a home-by-home, business-by-business, and block-by-block basis, as required to conduct the necessary analysis. A more complete illustration of GCI's cable plant coverage is contained in Exhibits E and F.

[39] Borland Decl. ¶ 28.

other parts.[40] Third, GCI's cable networks are not ubiquitous, even within its franchised service area.[41]

Although GCI's cable network does not – and would not be expected to – correspond with ACS's wire centers, examining GCI's use of UNEs across the ACS wire centers shows that residential customers in different wire centers would face far different competitive choices under ACS's requested forbearance.[42] Currently, in the seven largest wire centers, the percentage of retail lines for which GCI uses UNE-L, with one exception, ranges between **[BEGIN CONFIDENTIAL][END CONFIDENTIAL]** and **[BEGIN CONFIDENTIAL][END CONFIDENTIAL]** of the residential switched voice lines.[43] Factoring in resale service, which GCI must use in areas in which it cannot get access to a UNE loop at the ACS central office, in these wire centers GCI leases ACS facilities in some form for between **[BEGIN CONFIDENTIAL][END CONFIDENTIAL]** and **[BEGIN CONFIDENTIAL][END CONFIDENTIAL]** of GCI's residential lines. In the remaining wire center, where cable telephony deployment and customer transition is furthest along and residential locations are the most dense, GCI

---

[40] Haynes Decl. ¶ 13.

[41] *See* Zarakas Decl. ¶¶ 5, 8 and Exhibit V, attached thereto (showing percentage of GCI residential lines in ACS wire centers not near cable plant).

[42] The Anchorage Study Area is made up of the Central, East, North, O'Malley, Rabbit Creek, South, West, Elmendorf, Ft. Rich, Girdwood, and Indian wire centers. *See* National Exchange Carrier Association, Inc. Tariff F.C.C. No. 4, Section 13, at 2-3, 141st revision, issued September 16, 2005 (effective Oct. 1, 2005) ("NECA Tariff 4"). GCI does not believe that wire centers are the appropriate geographic market. The appropriate geographic markets are defined according to where GCI has plant that can be used to serve customers, which does not conform neatly with historical wire center boundaries.

[43] *See* Exhibit V, attached to Zarakas Decl. GCI must serve 100% of residential lines using ACS facilities (UNE or resale) in the areas in which it has no cable plant, which are wire centers included in the "Other" category in Exhibit V.

still provides only **[BEGIN CONFIDENTIAL][END CONFIDENTIAL]** of the last-mile facilities that it uses to provide residential service.[44]

Furthermore, even in areas that are passed by GCI cable plant, MDUs face different competitive alternatives to ACS loops than do single family dwellings. GCI has not been able to deploy to larger MDUs using its network-powered cable telephony service because of a lack of network-powered multiline multimedia terminal adapters ("MTAs"), and the operational difficulty of installing additional drops.[45] Accordingly, MDUs should be considered as a separate relevant market from single-family dwellings.[46]

The second product market is small business. Again, these services are marketed by both GCI and ACS distinctly from their residential offerings.[47] And, for the same reasons as discussed above with respect to residential telephony service, services to small business customers cannot be treated as a single geographic market across the entire Anchorage LEC study area, but must be separated according to the level of competitive alternatives to ACS loops. Further, cable telephony cannot be used to serve GCI's small business customers outside of GCI's cable service area. And even within GCI's franchised cable area, cable plant does not run down every street – particularly in business areas. As evidence of this, GCI currently serves **[BEGIN CONFIDENTIAL] [END CONFIDENTIAL]** of its Anchorage retail residential lines using leased ACS facilities, but serves **[BEGIN CONFIDENTIAL][END CONFIDENTIAL]** of its

[44] *See id.*

[45] Haynes Declaration ¶¶ 17-19.

[46] Sappington Decl.¶ 29.

[47] *See supra* at 13 n.35.

Anchorage retail small business customer lines over leased ACS facilities.[48] Moreover, looking at GCI retail business switched voice lines (for all sizes of business customers), and excepting a single wire center, in the seven largest wire centers GCI serves from **[BEGIN CONFIDENTIAL][END CONFIDENTIAL]** to **[BEGIN CONFIDENTIAL] [END CONFIDENTIAL]** of the business switched voice lines over leased ACS facilities.[49]

Moreover, even when GCI completes the upgrade of its entire cable system to provide cable telephony, there will still be significant differences within Anchorage as to the competitive alternatives to ACS loops when serving small business customers. Anchorage-wide, GCI will not be able to self-provision loops to serve approximately **[BEGIN CONFIDENTIAL][END CONFIDENTIAL]** of small business customer lines.[50] This will likely vary substantially across the ACS wire centers.[51]

The third product market is composed of medium to large enterprise customers, who have 8 or more switched business lines or who require higher capacity lines, such as DS1s, fractional DS1s, and high capacity services provided by a combination of GCI

---

[48] *See* Zarakas Decl. ¶ 18 and Exhibits I and IV, attached thereto. ACS's Petition concludes that GCI serves one-third of its retail lines over "its own facilities or its own multiplexing." ACS Petition at 8. This metric is misleading because it includes instances where GCI uses its own multiplexing equipment to serve 4-6 lines over an ACS UNE loop. Because GCI would not be unable to serve these customers without UNE access, these lines should be counted apart from the lines that GCI serves using exclusively its own facilities. In other words, if ACS receives the relief that it seeks here, GCI will no longer be able to provide facilities-based service to these customers.

[49] Exhibit VI, attached to Zarakas Decl.

[50] Zarakas Decl. ¶ 36 and Exhibit I, attached thereto.

[51] *See* Exhibit VI, attached to Zarakas Decl.

electronics and DS0 loops.[52] ACS's attempt to group these customers with small business customers is wholly disingenuous. Differences in retail market share alone between business switched voice services generally (in which ACS has a **[BEGIN CONFIDENTIAL][END CONFIDENTIAL]** market share) and non-switched DS1 circuits (in which ACS has a **[BEGIN CONFIDENTIAL][END CONFIDENTIAL]** market share), show that these medium to large business customers are not in the same product market as small business.[53] Moreover, independent industry participants have placed DS1 based services in a different market from the small business DS0s.[54]

Once again, the entire ACS LEC study area is not the appropriate geographic market for evaluating service to medium and large business locations, which must be viewed according to the proximity to GCI's fiber network. In many instances, GCI's cable plant does not "pass" such customers and, in any event, equipment manufacturers do not currently offer standardized DOCSIS products that allow GCI to serve such customers' needs via last-mile cable facilities because there are no DOCSIS standards for DS1 services.[55] Today, **[BEGIN CONFIDENTIAL][END CONFIDENTIAL]** of GCI medium and large business customer locations with non-switched DS1s are served using

---

[52] As Dr. Sappington observes, it may be better to place customers with DS3 and greater capacity connections in a separate product market. Sappington Decl. at ¶ 31. However, because there are relatively few of these customers in Anchorage, and because GCI purchases no DS3 UNEs, these customers are significant here only to the extent they purchase DS1s. Thus, we do not treat these customers as a separate product market.

[53] Compare Exhibit III, attached to Zarakas Decl., with Exhibit II, attached to *id*.

[54] *See generally* Donald Sorenson, *MSO Commercial Services Development, Scientific-Atlanta's Position on the Significance of Commercial Services and the Critical Success Factors for MSOs*, Scientific-Atlanta, Commercial Service Series, http://www.scientificatlanta.com/products/customers/commercialservicesPDFs/0803_G1499A_CommSvcCable.pdf (last visited January 5, 2006) ("Sorenson"); *see also* Sappington Decl. ¶ 30.

[55] Haynes Decl. ¶¶ 20-22.

facilities leased from ACS.[56] Moreover, as William Zarakas finds, it would not be economic to extend GCI's fiber network to serve the vast majority of these locations.[57] Thus, the substantial majority of such locations will continue to be accessible only using UNEs leased from ACS, even as certain residential locations (that are currently accessible only through UNEs) become accessible over GCI's last-mile cable facilities.

As discussed below, GCI is moving as quickly as possible to create its own substitutes for ACS's last-mile facilities.[58] ACS will nevertheless continue to dominate the market for this critical input to local service even after GCI moves as many of its customers as it can to self-provisioned, full facilities-based service.[59] For this reason, granting ACS forbearance from unbundling and related pricing obligations with respect to UNE loops would, in all product markets, undermine the competition that has developed in the Anchorage retail market and thereby reverse the substantial progress that has been achieved to date in Anchorage.

---

[56] *See* Exhibit II, attached to Zarakas Decl.

[57] *See* Zarakas Decl. ¶¶ 44, 48 and Exhibit IX, attached thereto (showing that of **[BEGIN CONFIDENTIAL][END CONFIDENTIAL]** off-net GCI medium and large business locations with 8 or more switched voice lines and/or one or more non-switched DS1s, it would be economic to extend GCI's fiber network to serve **[BEGIN CONFIDENTIAL][END CONFIDENTIAL]**, depending on the weighted average cost of capital).

[58] *See generally* Borland Decl. ¶¶ 11-17.

[59] Zarakas Decl. ¶¶ 7, 16.

B. GCI's Cable Telephone Facilities are Nascent and Cannot Serve All Product Markets in Anchorage.

Since GCI identified a workable cable telephony solution, it has moved as quickly as possible to deploy its own facilities to enable it to provide telephone service to Anchorage consumers without relying on ACS facilities.[60] In just two years, GCI has constructed **[BEGIN CONFIDENTIAL][END CONFIDENTIAL]** of the new nodes it expects will be necessary to allow GCI to serve most residential and many small business customers passed by GCI's cable plant, and GCI plans to complete this construction (and migrate existing customers to GCI facilities) as quickly as possible.[61] Moreover, and as discussed in greater detail below, GCI continues to pursue technological and other solutions that will enable it to serve more customers over its existing cable plant.

As demonstrated by these efforts, GCI does not require additional incentives to deploy its own facilities. GCI has made this effort because it strongly prefers not to rely on ACS for service.[62] By self-provisioning, GCI can avoid making payments to its chief competitor and control end-to-end service delivery to GCI's customers.[63] This latter benefit is particularly important to GCI, as one of its defining corporate missions is to deliver excellent customer service.[64] Finally, by self-provisioning GCI removes the ever-

---

[60] Declaration of Richard Dowling ¶ 2 ("Dowling Decl."), attached hereto as Exhibit G; Borland Decl. ¶¶ 11-26.

[61] Dowling Decl. ¶ 11; Borland Decl. ¶ 11 & n.4.

[62] Borland Decl. ¶¶ 4-17.

[63] *Id*.

[64] GCI has learned through years of experience that it cannot rely on ACS to deliver timely and reliable service, and has suffered untold delays and costs as a result. Although GCI has been able to improve ACS's performance through state commission inquiries,

present risk of increased UNE rates or other regulatory action that could undermine GCI's business plans.[65]

There are significant technical and operational limits, however, on GCI's ability to serve customers without access to UNE loops. To understand these limits one must understand (1) the history of GCI's cable telephony deployment and the nature of its existing facilities; (2) the steps GCI must take to offer high-quality voice service over its cable plant; (3) the obstacles to extending GCI facilities to multiple-dwelling units; (4) the absence of GCI cable plant near most businesses; and (5) the technical challenges to providing high-capacity business services over cable plant.

1. GCI's Development of its Cable Telephony Solution

Unlike many other cable providers, GCI was a telecommunications carrier (offering long distance service) long before it became a cable operator.[66] In 1995, GCI acquired the cable facilities of three different Alaska cable providers, including the Anchorage cable system.[67] From the start, GCI hoped to use its newly-acquired cable assets to provide voice service, but at that time the necessary technology and equipment had not yet been developed.[68] With Congress's enactment of the 1996 Act, GCI was able to enter the local telephone market (using a combination of UNE loops and its own

---

complaints, and persistence, GCI believes that ACS routinely processes its customer's orders with greater speed and higher priority than GCI orders. *Id*. ¶¶ 13-14.

[65] *Id.* ¶¶ 4-17.

[66] Dowling Decl. ¶ 3.

[67] *Id.*

[68] *Id*. ¶¶ 4-5.

facilities) as it prepared to offer full facilities-based service by performing upgrades to its cable plant and working to develop a cable telephony solution.[69]

Even after completing initial upgrades necessary to enable GCI's cable plant to carry return signals – a first step to providing voice service – GCI could not deploy cable telephony because suitable standards and technology had not yet been developed.[70] It was not until the end of 2001 that the cable industry, through CableLabs, developed and issued DOCSIS 2.0 specifications for advanced cable modems that would truly enable reliable, high-quality packetized voice service over cable plant.[71] In parallel, CableLabs developed the Packet Cable standard, which governed the signaling used to support telephony over cable modems.[72]

It took some time after issuance of these standards for the relevant equipment manufacturers to incorporate them into their products.[73] Moreover, because standards can be interpreted differently by different manufacturers, GCI had to conduct interoperability testing among the various pieces of network equipment it planned to use to provision its cable telephony service.[74] As is expected, the validation process identified new issues that required new solutions.[75] For example, GCI had to develop its own echo-canceling firmware to deal with an unsatisfactory echo inherent in the new

---

[69] S. Rep. No. 104-230, at 148 (1996) (Conf. Rep.).

[70] Dowling Decl. ¶ 4. As a relatively small MSO, ACS could not drive the market for the necessary technology and equipment. *See id.* ¶ 10; Declaration of Gary Haynes ¶ 23 ("Haynes Decl."), attached hereto as Exhibit H.

[71] Dowling Decl. ¶ 5.

[72] *Id.* ¶ 5 & n.2.

[73] *Id.* ¶ 5.

[74] *Id.* ¶ 6.

[75] *Id.*

technology.[76] Meanwhile, some prospective vendors went out of business or stopped supporting products GCI had considered deploying.[77] By the end of 2002, GCI was nonetheless able to begin initial field trials of its cable-based telephony service, including the initial upgrades and node construction to support its commercial launch of service in April 2004.[78]

Because GCI was already providing voice service using UNE loops, GCI could only adopt cable telephony solutions that met or exceeded the quality of GCI's existing service.[79] In addition, GCI is subject to state regulations requiring eight hours of backup power in the event of a power failure.[80] Finally, GCI sought a solution that would allow provisioning without requiring customers to be home for indoor installations.[81] Primarily for these reasons, GCI selected network-powered, outdoor-provisioned technology to deliver its cable telephony to customers.[82]

2. Extending Cable Telephony to Existing Residential Customers

After selecting and validating its cable telephony equipment and technology, GCI began the substantial work necessary to enable GCI's existing cable plant to deliver voice service. This upgrade process requires several steps. Even after the upgrades described

---

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.* ¶ 9.

[80] *Id.* ¶ 8 (citing 3 AAC § 52.270 (b)).

[81] *Id.* ¶ 9; Haynes Decl. ¶ 4.

[82] In an effort to further speed its deployment of cable telephony, GCI is currently considering use of a customer-powered, rather than network-powered, network design and CPE. Dowling Decl. ¶ 11. It is not clear, however, whether this approach will work to transition existing customers. *Id.*; *see also* Haynes Decl. ¶ 4.

below are completed, GCI will be unable to serve customers that are not reached by GCI's cable plant without the use of UNEs.[83]

Network-Wide Upgrades. The cable telephony plant upgrade process begins at GCI's switch, where GCI must install a host of new equipment, including voice gateways, Cable Modem Termination Systems ("CMTS"), narrowcast lasers, wave division muliplexers, and optical splitters.[84] Voice gateways are necessary to convert time division multiplexed voice signals from GCI's 5E switch to Internet Protocol ("IP") packet data, which the CMTS modulates onto a Radio Frequency ("RF") carrier.[85] The RF carrier is then converted to optical signals through the narrowcast lasers, wave division muliplexers, and optical splitters for transport across high capacity fiber optic cable to the optical nodes in the field.[86] These are not one-time upgrades.[87] Instead, as GCI expands its DLPS service areas, it must continually add equipment at its switch location to handle the resulting increases in DLPS traffic.[88]

Node Construction and Upgrades. The upgrade process then continues at each GCI node. Existing nodes are "right-sized" to provide voice service.[89] In other words, to diminish noise created by the addition of a return path and to reduce the number of voice

---

[83] GCI, for example, is not the cable provider for ACS's Girdwood wire center. Borland Decl. ¶ 28. Exhibit E attached hereto shows the areas in Anchorage where GCI is certified as a CLEC but that are outside of its cable franchise. In all of those areas, as in Girdwood, GCI does not have cable plant and cannot provide cable telephony.

[84] Haynes Decl. ¶ 3.

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Id.* ¶ 5.

subscribers that could be affected by a node malfunction, the number of subscribers supported by each node is reduced.[90] Because right-sizing reduces the number of customers served by each node, GCI must also construct additional nodes in order to be able to serve all of its existing customers.[91]

To provide cable television and modem service throughout GCI's service area required approximately **[BEGIN CONFIDENTIAL][END CONFIDENTIAL]** nodes.[92] Providing cable telephony throughout GCI's cable franchise area will require approximately **[BEGIN CONFIDENTIAL][END CONFIDENTIAL]** additional nodes.[93] Each node construction requires an initial site survey for the node location.[94] Before construction can begin, GCI must coordinate with the power company to run a new power supply to the increased number of power insertion points and obtain an easement from the City of Anchorage.[95] After these steps have been completed, GCI may construct the new node and upgrade power supply locations in order to provide eight hours of battery back-up power.[96] Existing nodes must also be modified to accommodate the network and backup powering necessary for GCI's cable telephony equipment.[97]

---

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.* ¶ 13. Each node serves approximately **[BEGIN CONDFIDENTIAL][END CONFIDENTIAL]**, with the size of the geographic area served varying based on density. *Id.*

[94] *Id.*¶ 7.

[95] *Id.*

[96] *Id.*

[97] *Id.*

Construction of a single node typically takes six to eight weeks.[98] GCI constructed **[BEGIN CONDFIDENTIAL][END CONFIDENTIAL]** new nodes in 2004 and **[BEGIN CONDFIDENTIAL][END CONFIDENTIAL]** in 2005.[99] After node construction is complete, existing amplifiers and taps must be modified to accommodate line-powering.[100]

Customer-by-Customer Drop and Equipment Provisioning . Next, GCI must upgrade its customer drops. This requires a drop-by-drop assessment, as drops suitable for providing video programming and cable modem service are not always suitable for carrying line-powered voice service.[101] First, to ensure high-quality service, GCI requires that network-powered drops be physically protected up to the point where they arrive at a common utility interface.[102] Because drops used for cable television and modem service are generally not protected in this way, GCI must protect its existing drops before using them for voice service. This is typically achieved by burying the drop, a task which cannot be performed between October and April because of ground freeze in Anchorage.[103] Second, some drops perform poorly when subjected to the extra voltage

[98] *Id.* If GCI transitions to customer-powered DLPS, node construction and modification time will be reduced, as some of power upgrades will no longer be required. *Id.* ¶ 8. However, GCI will still have to split and modify nodes and provide battery backup power for the network itself. *Id.* GCI estimates that node modifications to support customer-powered DLPS will require two to three weeks per node. *Id.*

[99] *Id.* ¶ 13.

[100] *Id.*

[101] *Id.* ¶ 9.

[102] *Id.*

[103] *Id.* ¶ 14.

necessary to deliver voice, and must be replaced.[104] Once all drop issues have been resolved, GCI affixes the terminal unit to the subscriber's unit at the NID, which is typically located on the outside of the premises and so is accessible without inconveniencing the customer.

3. Special Problems of Multiple-Dwelling Units

Approximately **[BEGIN CONDFIDENTIAL][END CONFIDENTIAL]** of GCI's residential lines in Anchorage are located in multiple dwelling units ("MDUs") with greater than 8 lines.[105] In many cases it is not technically or operationally feasible to provide cable telephony service to customers in MDUs.[106] First, drop capacity is limited.[107] Traditional cable television services are provided to MDUs through a single drop line powered by a building amplifier.[108] The network-powered lines GCI uses to provide voice service, however, require additional drops, each of which can power at most two terminal units.[109] Each terminal unit can serve four lines.[110] As a result, serving MDUs that contain more than eight units requires additional drops and additional terminal units.[111] It is not always possible to deploy this equipment, however, as the

---

[104] *Id.* ¶ 9. If GCI were to move to customer-powered units, the required drop assessment and upgrade work would be reduced. *Id.* ¶ 10. Some, if not all, gains in time would likely be offset, however, by installation difficulties arising from the required indoor installation. For both customer and network-powered units, of course, these are just single steps in the process.

[105] *Id.* ¶ 17.

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *Id.*

telecommunications closets of many MDUs simply do not have the space to accommodate several additional terminal units.[112] As a result, GCI often cannot serve customers located in MDUs over its own last-mile facilities.[113]

This discussion of obstacles is unavoidably incomplete. GCI began its roll-out of cable telephony less than two years ago, and has focused its efforts and resources thus far on the relatively simpler transition of customers in single-family homes and other non-MDUs.[114] As is typical with deployment of any new technology, it is likely that in exploring new solutions for customers in MDUs, GCI will discover additional obstacles that cannot be known in advance of deployment.[115]

4. Reaching Business Customers

GCI faces significant obstacles in its efforts to serve business customers through cable plant. As an initial matter, GCI's cable plant simply does not pass many business locations.[116] Even where GCI's cable plant does pass commercial buildings, few

---

[112] *Id.*

[113] *Id.*

[114] *Id.* ¶ 18.

[115] In an effort to address these challenges, GCI has been working with manufacturers to develop network-powered solutions for MDUs. *Id.* ¶ 19. In fact, GCI recently received a beta version of a 12-line network-powered BTI that could mitigate the MDU operational obstacles described above. *Id.* This new equipment is not scheduled for commercial manufacturing until at least April 2006. *Id.* Commercial deployment will be possible only after manufacturing commences and all technical issues are resolved, a process that typically takes a significant amount of time. *Id.* GCI is also exploring the possibility of addressing powering issues by moving to customer-powered MTA units. As described above in text and footnote to Section III.B.2, however, these units present their own challenges, and it is also not yet clear how best to provision these units in an MDU setting.

[116] *Id.* ¶ 20.

businesses subscribe to cable.[117] Wiring businesses that do not already subscribe to cable often requires access to conduit space, and obtaining this access in Anchorage has been difficult and time consuming.[118] Further, conduit work generally cannot be performed during the winter months in Anchorage.[119] As a result, GCI often cannot extend cable plant to business customers within a commercially reasonable time.

5. Using Cable Plant to Serve Enterprise Customers

Even where GCI can reach medium and large businesses with its cable plant, that plant does not support the types of service commonly provided over DS1 or fractional DS1 lines, such as PRI and DSS services.[120] Nor does cable plant support the high-capacity services GCI provides by combining DS0 loops with its electronics. This is not surprising, as cable standards and cable networks were developed for voice and high speed Internet service for residential and very small business services. While some work-around solutions have been developed, they are cumbersome, expensive, and reduce service reliability.[121] For these reasons, they do not represent a standardized commercially or operationally acceptable alternative to traditional DS1 service.[122] Instead, in order to provide commercially acceptable retail service to its current DS1 based business customers, GCI requires access to ACS DS1 UNEs.[123]

---

[117] *Id.* ¶ 21.

[118] *Id.*

[119] *Id.*

[120] *Id.* ¶ 22; *see also* Sorenson, at 2 (explaining that providing DS1s over cable plant "poses a serious service deployment challenge" as such services "are not well suited for . . . DOCSIS").

[121] Haynes Decl. ¶ 22.

[122] *Id.*

[123] *Id.*

C. GCI's Fiber Facilities are Not a Feasible Competitive Alternative for Serving Most Enterprise Locations.

GCI cannot use its fiber facilities to replace DS1 UNEs for most enterprise customers. As an initial matter, GCI simply does not have fiber throughout Anchorage.[124] Instead, GCI's fiber is concentrated in the Anchorage downtown and midtown areas, which roughly coincide with the ACS North and Central wire centers.[125] Businesses that are not on GCI's fiber cannot, of course, be served by these facilities.

In the areas where GCI does have fiber, it is nonetheless not feasible for GCI to serve most enterprise locations using that fiber. The average business customer in Anchorage requires only 6.36 lines, and is consequently not large enough to generate the volume of traffic necessary to justify the customer expense of on premises equipment or the GCI expense of constructing last-mile fiber facilities.[126] Practice in Anchorage confirms this conclusion, as neither GCI nor ACS commonly uses fiber to serve business locations that only require one or two DS1 equivalents. And Mr. Zarakas reaches just this result in his analysis of the economics of extending fiber, determining that it would be uneconomic for GCI to extend fiber to **[BEGIN CONFIDENTIAL][END CONFIDENTIAL]** customers being served over DS1 UNEs absent demand for at least two DS1s, and even finding that it would be uneconomic to extend fiber facilities to **[BEGIN CONFIDENTIAL][END CONFIDENTIAL]** locations with as many as 8 DS1s.[127]

---

[124] Declaration of Blaine D. Brown ¶¶ 4-9 ("Brown Decl."), attached hereto as Exhibit J; *see also* Exhibit BB1, attached thereto.

[125] *Id.* ¶ 5.

[126] *Id.* ¶ 11.

[127] *See* Zarakas Decl. ¶¶ 38-44, 48 and Exhibit VIII, attached thereto.

Even where customers are on GCI's fiber plant and serving them using fiber would be economic, there are additional obstacles that limit the feasibility of extending fiber last-mile facilities in a commercially reasonable period of time. Construction of last-mile fiber facilities is time consuming. In downtown and much of midtown Anchorage, where businesses are most dense and GCI has fiber facilities, extension of last-mile facilities typically requires road bores, permits to shut down streets, and pavement construction and reconstruction.[128] Acquiring the necessary permits from the City of Anchorage alone takes an average of ten days.[129] As a result, even during the Anchorage construction season, it is generally not possible to extend new fiber facilities within the **[BEGIN CONDFIDENTIAL][END CONFIDENTIAL]** that Anchorage customers will typically wait for connection of new service.[130]

Where customers may be economically served using fiber, it is very difficult for GCI to gain access to building entrance facilities. For one, it is quite costly to construct new entrance conduit.[131] Putting aside cost, many building owners either do not want or do not have the physical space (or power) to accommodate new building entrance facilities or the electronics necessary to turn fiber into loop plant.[132]

ACS's proprietary treatment of building access facilities further limits GCI's ability to extend fiber last-mile facilities. ACS has asserted that it is entitled to exclusive

---

[128] Brown Decl. ¶¶ 12-13.

[129] State permitting takes longer – 30 days, on average.

[130] Borland Decl. ¶ 44.

[131] Brown Decl. ¶ 13.

[132] *Id.* ¶ 18.

use of any conduit placed by building owners, and has repeatedly worked to block GCI access to conduit.[133] For example,

- At the Peanut Farm, after construction of a new addition and with the approval of the building owner, GCI placed coaxial cable in the new entrance conduit. ACS responded by threatening to remove the cable and refusing to deliver the UNE loop for DSL service. In the face of these actions, GCI removed its cable.

- At a newly constructed building for the Alaska Dance Theater, GCI coordinated with the Building Project Manager and placed its coaxial cable in building entrance conduit. When GCI placed an order for UNE loops with ACS, ACS demanded that GCI remove its cable from the entrance facilities. ACS refused GCI's suggestion that the companies use innerduct and share the entrance conduit. Unwilling to stand in the way of the customer receiving phone service, GCI pulled its cable from the conduit. ACS then intercepted and redirected the conduit, effectively precluding access by GCI or any other competitor.

- At Bailey's Furniture, in the summer of 2005, the building project manager gave GCI permission to use the only entrance conduit to the building. GCI pulled in a temporary copper cable (along with inner duct) to provide dial tone for 3 POTS lines necessary for the certificate of occupancy phones. When GCI arrived on site to pull in fiber, the ACS line crew demanded that GCI stop. GCI did not acquiesce, but attempted to accommodate ACS by leaving the copper in place and offering to give ACS use of the copper or of inner duct. ACS has not yet responded to GCI's proposal.[134]

As these recent examples demonstrate, even as ACS works to deny GCI access to ACS's last-mile facilities by seeking forbearance from unbundling obligations, ACS is taking unreasonable steps that impede GCI's ability to deploy its own last-mile facilities. These artificial obstacles, layered on the many operational and economic barriers already in place, further limit GCI's ability to serve customers using its own last-mile fiber facilities.

---

[133] *Id.* ¶ 19.

[134] *Id.*

D. GCI is Deploying its Own Facilities as Quickly as Possible.

As discussed above, GCI has compelling reasons to transition its customers to GCI facilities as quickly as possible. There are, unfortunately, a number of operational, economic, and technical reasons why GCI cannot speed up its ongoing transition to cable telephony, even where cable plant is present.

Turning first to operational constraints, any construction project of this magnitude requires substantial advance planning. This process begins with engineering design, a several month process. This is followed by permitting.[135] During the winter, right of way agencies will not issue the permits required for GCI's upgrade process.[136] It is also doubtful that GCI could immediately obtain the volume of equipment necessary to perform accelerated upgrades.[137] Weather also limits the Anchorage construction season to the period from April to October.[138] Even during the permitting season, it is unlikely that right of way agencies could handle a substantial increase in permit applications without significant delays.[139] GCI took these various constraints into account when planning and beginning its cable telephony deployment.[140] For these reasons, it would simply not be feasible for GCI to move any more quickly than it already is to construct its

---

[135] Haynes Decl. ¶ 6.

[136] *Id.* ¶ 7.

[137] For example, some of the upgrade activity requires modification of current plant that must be removed from service, upgraded, and subsequently replaced, complicated the equipment procurement and replacement timeline. *Id.* ¶ 14.

[138] *Id.*; Brown Decl. ¶ 17.

[139] While transitioning to customer-powered units could mitigate some of these obstacles, it would not eliminate seasonally-constrained outdoor node and drop. Moreover, installing equipment indoors brings scheduling and customer relations difficulties not present with outdoor provisioning.

[140] Haynes Decl. ¶ 11.

own cable telephony facilities, and significant schedule changes could require 18-24 months to implement.[141]

Accelerating the transition to GCI facilities would also require significant cash outlays.[142] These resources are further constrained by GCI's parallel efforts to expand its cable telephony service in Fairbanks in Juneau. While it is true that this is only money,[143] it would simply not be economic for GCI to accelerate its deployment of its own facilities even assuming that operational limits could somehow be overcome. And, acting in an uneconomic fashion would, in the long run, increase GCI's cost of capital and otherwise constrain its ability to fund further deployment of its own facilities. It would be nonsensical for regulatory policy to drive a functioning competitive market to this state, especially where there is every sign that transition to fully self-provisioned facilities-based service is proceeding with all due speed.

Nor is it clear that there are technological solutions that could speed GCI's transition. GCI has, from the start, been on the cutting edge of cable telephony development and has already expended significant resources to drive development of acceptable cable telephony solutions. Despite these efforts, and reflecting in part GCI's place as a relatively small player in the cable industry, cable telephony technology is still maturing. GCI has adopted and continues to adopt the various elements necessary for its

---

[141] *Id.*

[142] Even if it were available, the additional labor, supervision, materials, trucks, and contract engineers necessary to transition all of Anchorage to GCI's cable facilities in short order would exponentially increase the current per-mile cost of deploying GCI's last-mile cable facilities. *Id.* ¶ 14; Brown Decl. ¶ 17.

[143] ACS Petition at 35; *see also infra* at 36 n.148.

deployment of cable telephony as quickly as possible. Forcing any faster deployment would unacceptably compromise the quality of GCI's service.[144]

ACS's petition also cites several statements made by GCI officers to the RCA and to investors, purportedly establishing that GCI is currently capable of providing voice service to "nearly all" of Anchorage over its own facilities and is delaying deployment only because of the availability of UNEs.[145] In fact, the cited statements prove no such thing. They instead represent straightforward explanations of GCI's basic business strategy to investors and regulators, *viz.* GCI's plan to modify its existing cable plant as quickly as economically and operationally feasible so as to reduce its dependence on ACS-supplied UNEs for residential customers. ACS's petition offers tortured readings of isolated statements to purportedly establish that, *inter alia*, GCI has already completed the conversion process,[146] that the process when completed will affect business and MDU

---

[144] Dowling Decl. ¶ 12.

[145] ACS Petition at 2, 3, 9, 14, 15, 35. ACS also asserts that the Chair of the RCA has identified Anchorage as a "mature competitive market[]" with emerging facilities based competition. *Id.* at 10 & n.45 (citing Transcript of RCA Public Meeting, Volume I, Presentation of Kate Giard, R-03-03, at 41 (March 30, 2005) ("RCA Meeting Transcript")). In truth, the Chair's reference to mature competition refers only to the level of *retail* competition, a point that is reinforced by the next sentence, which explains that Anchorage, Juneau, and Fairbanks are distinct from the rest of Alaska because "they have [e]merging facilities based competition *and also substantially UNE competition*." RCA Meeting Transcript at 41 (emphasis added). ACS's Petition paraphrases the "emerging facilities based" language but omits the critical reference to substantial UNE competition – an omission that is emblematic of ACS's general unwillingness to acknowledge the critical importance of UNEs to retail competition in Anchorage.

[146] ACS cites statements made by a GCI executive to the RCA for the proposition that GCI "is capable of providing local exchange and exchange access service over its own facilities by cable, fiber or copper to nearly all of Anchorage." ACS Petition at 2 (citing *Petition of GCI for Arbitration Under Section 252 of the Communications Act of 1996 with the Municipality of Anchorage a/k/a ATU Telecommunications for the Purpose of Instituting Local Exchange Competition*, RCA Docket No. U-96-89, Prefiled Rebuttal Testimony of Dana Tindall on Behalf of GCI, at 5 (filed with the RCA on Sept. 29, 2003) ("Tindall Prefiled Rebuttal Testimony") (attached as Exhibit J to ACS Petition)); *see also*

customers rather than just single home residential customers,[147] or that GCI is not moving as quickly as possible to complete the process because of access to UNEs.[148] In fact,

---

ACS Petition at 9, 14. But Ms. Tindall merely stated that "GCI is proud that its cable telephony *will* pass 98% of homes in Anchorage." Tindall Prefiled Rebuttal Testimony at 5 (emphasis added). Most importantly, for all the reasons given above, the fact that cable "passes" a home does not mean that GCI can currently provide voice service to that home. Moreover, the statement addresses only the company's *future* plans (it uses the term "will" rather than "does") and it addresses only homes – not businesses or MDUs. In fact, Ms. Tindall went on to emphasize that GCI's cable plant is not a suitable alternative for serving "many businesses." *Id.* at 5.

[147] *See id.* In addition, ACS cites GCI's Q2 2004 Earnings Call Transcript at 4,11 (July 28, 2004) ("Q204 Transcript") (attached as Exhibit F to ACS Petition) for the proposition that GCI "has announced plans to convert the entirety of its local exchange service customer base to its own facilities, including its cable plant, which passes nearly every residence and business in Anchorage." ACS Petition at 2 & n.7; *see also id.* at 14. In fact, GCI officers explained to investors only that it is "*positioning*" itself "to deploy digital local phone service using . . . cable plant instead of leased local loops or other means involving the incumbent local exchange provider." Q204 Transcript at 4 (emphasis added). Viewed in context, this statement does not make any representations about business or MDU customers that cannot at present be served using GCI's "cable plant."

[148] ACS asserts that GCI's Chief Executive Officer has told investors that all the bottlenecks that prevent the immediate transition of current UNE customers to GCI's own facilities "'can be cured by money.'" ACS Petition at 35 (citing Q204 Transcript at 11); see also ACS Petition at 8, 15. There is no indication the speaker is addressing anything other than the residential market. Moreover, the emphasis is on the "probably . . . 25 bottlenecks that kick in at various levels" to impede the conversion process and the fact that speeding up the process unduly would render it uneconomic. Q204 Transcript at 11. Plainly, consumers – who will ultimately pay the costs of investment through higher prices – are best served if GCI continues to convert its facilities at a rate that does not require reckless and/or wasteful spending.

ACS also cites two statements by GCI Senior Vice President Dana Tindall for the proposition that "the rate at which GCI transitions its UNE loops to its own cable telephony network is entirely dependent upon the cost of leasing ACS's UNEs." ACS Petition at 8 (citing *Petition of GCI for Arbitration Under Section 252 of the Communications Act of 1996 with the Municipality of Anchorage a/k/a ATU Telecommunications for the Purpose of Instituting Local Exchange Competition*, RCA Docket No. U-96-89, Testimony of Dana Tindall on Behalf of GCI, Before the Regulatory Commission of Alaska, Public Hearing, Volume X at 850 (Nov. 6, 2003), ("Tindall Nov. 6, 2003 Testimony")); ACS Petition at 3, 42 (citing Tindall Prefiled Rebuttal Testimony at 3). In fact, in both instances, Ms. Tindall simply made the unremarkable concession that the UNE rate is one among many factors that GCI must consider, as a matter of basic economics, in assessing the opportunity costs of building its none of these claims accurately portrays the current or future state of GCI's business. Rather, as demonstrated in the footnotes below, in each of the cited statements, GCI has been careful to give regulators and investors a complete and accurate picture of the progress that GCI has made to date, the scope of that progress, and the fact that the conversion process is a complicated and costly one that will take a significant period of time to complete.[149]

---

own last-mile facilities – and thus that an extreme increase or decrease in the UNE price might, in theory, change the economic logic of building facilities. See Tindall Prefiled Rebuttal Testimony at 3 (noting that "[r]aising UNE rates *dramatically* would compel GCI to speed up") (emphasis added); Tindall Nov. 6, 2003 Testimony at 850-851 (responding to the suggestion of cutting the UNE rate *in half*: "I'm not saying what we would do, but if it gets down to the rate where I believe a TELRIC rate makes a competitive entrance somewhat indifferent between building versus leasing we would have to look at it."). But Ms. Tindall nowhere suggested that the UNE rate is the only – or even the most important – factor in GCI's build/lease decision. In fact, Ms. Tindall went on to emphasize that even in the face of a 50 percent reduction in the UNE rate, "I do believe we would still build out our cable telephony plan[t] because we have a lot of non-price reasons for building a cable telephony plant . . . . Our non-price reasons are for ACS to no longer have control over our customer base by their network and for business certainty." Tindall Nov. 6, 2003 Testimony at 851. Ms. Tindall also emphasized that operational factors, and not UNE rates, play a critical role in determining how fast GCI can convert its customers to its own facilities, and that "even when fully deployed, [GCI's cable last-mile facilities] will not be ubiquitous." Tindall Prefiled Rebuttal Testimony at 3.

Finally, ACS implausibly asserts that GCI accelerated its transition from UNEs in 2004 substantially in response to the RCA's increase of UNE loop rates. ACS Petition at 3. In fact, as ACS's own expert concedes, "GCI hastened its own facilities deployment . . . two months *before* the RCA increased the loop rate that ACS could charge." ACS Petition, Statement of David C. Blessing in Support of ACS, at 15, attached to ACS Petition as Exhibit E ("Blessing Stmt."). In any event, ACS has not begun to show any causation between the two events, nor does it address the significant non-price and regulatory certainty considerations that tip the balance towards building rather than leasing. More generally, ACS's expert has no answer to the many non-price reasons discussed above for GCI to build its own facilities.

[149] *See, e.g.,* Q204 Transcript at 11 ("There are a lot of interoperable plant and customer issues associated with the [conversion of UNE customers to DLPS]. We're going through a process of trying to identify and mitigate bottlenecks that occur at certain deployment levels."); Tindall Prefiled Rebuttal Testimony at 5 ("While GCI is proud that its cable telephony will pass 98% of the homes in Anchorage, there are still many

E. Commercial Negotiations Will Not Result in Non-Monopolistic Rates for UNEs.

ACS suggests that non-monopolistic rates for Anchorage UNE loops can emerge from commercial negotiations, citing both GCI's exclusive control over some last-mile facilities in Anchorage and successful commercial negotiations between ACS and GCI in Fairbanks and Juneau.[150] Neither of these points, however, supports a conclusion that commercial negotiations unconstrained by regulatory requirements will result in non-monopolistic rates for UNEs in Anchorage.[151]

First, GCI controls only a very small proportion of the last-mile facilities in Anchorage. While ACS currently provides last-mile access to more than 152,000 of the roughly 180,000 switched lines in service in Anchorage, GCI currently provides exclusive last-mile access to **[BEGIN CONDFIDENTIAL][END CONFIDENTIAL]** customers on Elmendorf Air Force Base and **[BEGIN CONDFIDENTIAL][END CONFIDENTIAL]** commercial office buildings.[152] While relatively proportional control of last-mile facilities might create incentives for ACS to negotiate reasonable rates and terms for GCI's use of ACS's facilities, there is no such proportional control

business customers whom we will not be able to serve over our cable telephony network.").

150 ACS Petition at 13-14.

151 *See generally* Sappington Decl. ¶¶ 87-96.

152 Exhibit I, attached to Zarakas Decl.; Brown Decl. ¶ 20.

here.[153] Access to GCI's last-mile facilities accordingly will not drive ACS to offer GCI just and reasonable rates for access to ACS's last-mile facilities.[154]

Indeed, when ACS asserts that "[t]he only Anchorage customers that are denied a choice are those that are being served exclusively by GCI's facilities,"[155] it actually illustrates the opposite of what it intends. As noted above, there are virtually no Anchorage customers served only by GCI's facilities. But if ACS receives the unbundling relief it seeks, an enormous number of Anchorage customers will be "denied a choice" of providers – only ACS will be able to serve them over its own facilities. And as ACS correctly recognizes, these customers can expect to lose "the benefit of competition . . . that most Anchorage customers" have received because they currently "have a choice of facilities-based providers."[156]

Nor does the history of negotiations in Fairbanks and Juneau indicate that ACS will negotiate just and reasonable rates in Anchorage in the absence of regulatory

---

[153] Sappington Decl. ¶ 95.

[154] ACS also incorrectly asserts that GCI has "vehemently opposed" ACS's request for loop reciprocity during RCA interconnection agreement proceeding. ACS Petition at 14 n.66 (citing *Petition of GCI for Arbitration Under Section 252 of the Communications Act of 1996 with the Municipality of Anchorage a/k/a ATU Telecommunications for the Purpose of Instituting Local Exchange Competition*, RCA Docket No. U-96-89, GCI Brief, Reciprocity: The Obligations Set Forth in Section 251(c)(3) Do Not Apply To GCI (filed May 13, 2003) ("GCI Section 251(c)(3) Brief"), reproduced at Exhibit K to ACS's Petition). In fact, in the pleading in question, GCI merely pointed out that Section 251 of the Communications Act applies only to ILECs and not CLECs – GCI's assertion of an entirely valid legal argument is hardly the malfeasance or anti-competitive "vehemence" that ACS seems to believe. At any rate, GCI has also made clear to the RCA that it is voluntarily committed to "tak[ing] all comers at the wholesale level on [its] cable plant" at TELRIC prices. Tindall Nov. 6, 2003 Testimony at 885; *see generally* Brown Decl. ¶¶ 20-21. Thus, there is simply no merit to ACS's claim that GCI refuses to offer ACS or other competitors access to its last-mile facilities.

[155] ACS Petition at 14, 27.

[156] ACS Petition at 14.

safeguards. In fact, quite to the contrary, the history of those negotiations demonstrates that ACS is unlikely to negotiate just and reasonable rates in the absence of external constraints.

ACS voluntarily negotiated UNE loop rates in Juneau and Fairbanks only after it made contradictory and very public representations about its financial well-being. Specifically, in response to GCI's petition to the RCA to terminate the rural exemptions for ACS's Juneau and Fairbanks affiliates, ACS repeatedly asserted that without the rural exemption – specifically, exemption from their continuing obligations to provide GCI with access to unbundled loops – ACS Fairbanks, ACS Juneau, and ACS as a whole would face serious financial difficulties.[157]

At roughly the same time, ACS's parent holding company filed with the SEC a draft prospectus for an Income Deposit Securities ("IDS") offering.[158] IDS offerings involve the sale equity and debt securities for investors looking for a current return in the form of interest payments and common stock dividends.[159] Therefore, only companies with a strong, stable cash flow can make a successful IDS offering.[160] Companies with volatile or declining cash flows are poor candidates for IDS offerings.[161] At no time in

[157] See, *e.g.*, Prefiled Opposition Testimony of Kenneth L. Sprain, RCA Docket Nos. U-97-082, U-97-143, at 4 (filed March 26, 2004) ("With the diminishing market shares and associated financial impacts, the Rural Companies have been forced to a point where they have already restricted our capital and maintenance expenditures to levels that provide only basic service and availability. These spending restrictions negatively affect many aspects of the companies' business, including capital spending, maintenance levels, and customer service."); *see also* Tindall Decl. ¶ 20.

[158] Brown Decl. ¶ 21.

[159] *Id.*

[160] *Id.*

[161] *Id.*

that prospectus did ACS's parent acknowledge or disclose that it faced a material risk of impaired cash flow in the event that its Fairbanks and Juneau subsidiaries were required to continue to provide UNE loops to GCI.[162]

GCI raised this disparity before the RCA by filing expert testimony explaining that the IDS offering conflicted sharply with ACS's statements that its near-term financial danger required RCA's reinstatement of ACS's rural exemption in Fairbanks and Juneau.[163] Only after this expert testimony exposed the disparity between ACS's claims before the RCA and its IDS offering, and shortly in advance of a hearing at which ACS financial officers were likely to testify and be subject to cross-examination by GCI and the Regulatory Commission of Alaska, were ACS and GCI able to successfully negotiate availability and rates for UNE loops in Fairbanks and Juneau.[164] There is no similar incentive for ACS to negotiate in Anchorage today, and therefore no reason to infer that ACS will voluntarily reach reasonable terms and conditions in the absence of regulatory constraints. In fact, GCI asked ACS to negotiate UNE rates for Anchorage at the same time the parties negotiated UNE rates for Fairbanks and Juneau.[165] Despite the prospect of a lengthy and highly contested arbitration proceeding, ACS rejected that proposal and has since shown no interest in voluntary negotiation of Anchorage UNE rates with GCI.[166]

---

[162] *Id.*

[163] *Id.* ¶ 22.

[164] *Id.* ¶ 23.

[165] *Id.* ¶ 24.

[166] *Id.* ACS also claims that GCI has "acknowledged" that ILECs would be motivated to enter into negotiations for UNEs voluntarily. ACS Petition at 34 (citing *In the Matter of Commission Review of Rules and Regulations Governing Telecommunications Rates, Charges Between Competing Telecommunications Companies and Competition in*

F. Failure to Require ACS to Unbundle Loops and TELRIC Rates Will Allow ACS to Raise Rivals' Costs and Exercise Market Power

As demonstrated above, GCI must have access to unbundled loops in order to continue to serve most Anchorage homes and businesses. The forbearance ACS seeks would empower it to refuse to lease these loops to GCI, or to charge GCI supra-competitive prices for them. In short, it would give ACS nearly absolute control over the last-mile connections that are essential to the continuing vitality of GCI, its principal competitor. As the Commission recently explained in the *TRRO*:

> In the absence of UNEs, incumbent LECs would . . . have the ability to set the price of their direct competitors' critical wholesale inputs (*e.g.*, tariffed end-user channel termination . . .).
> …
> Such a rule would allow an unacceptable level of incumbent LEC abuse because incumbent carriers could strategically manipulate the price of their direct competitors' wholesale inputs to prevent competition in the downstream retail market. [167]

Economists and the courts have also long recognized that allowing a dominant provider to control such facilities is a recipe for higher prices, lower quality, and reduced consumer choice.[168] And in time, it would force the RCA (and possibly this

---

Telecommunications, GCI Reply Comments, RCA Docket No. R-03-03, at 7 (filed May 19, 2005)). In fact, GCI made no prediction about how an ILEC in ACS's shoes would act, but simply observed that if a rural ILEC's financial health were genuinely threatened by full facilities-based competition, then the rural ILEC could continue to gain some revenue from each line by leasing its loops at competitive prices. *Cf. Omaha Forbearance Order* ¶ 81. But that is a far cry from the situation here, where GCI does not have the stick of full-facilities based competition with which to force ACS to offer its loops at economically reasonable and competitive prices.

[167] *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, FCC Docket No. 01-338 (¶ 59, 63) (released February 4, 2005) ("*TRRO*").

[168] *See generally* Sappington Decl. ¶¶ 11-23, 113-122.

Commission) to return to regulating retail rates and terms in Anchorage. These are precisely the outcomes that Congress intended the 1996 Act to prevent.

ACS's petition conspicuously fails to address the fact that it is asking for pricing deregulation of a bottleneck facility.[169] Instead, ACS spends the bulk of its petition making an argument that boils down to "things are working well right now."[170] This demonstration is entirely beside the point. As a logical matter, the existence of adequate retail competition in a market with unbundling does not imply that retail competition will continue to be adequate if the Commission were to eliminate unbundling. Even more important – and as the Commission recognized in its recent *Omaha Forbearance Order* – ACS gets it exactly backwards to suggest that retail competition that exists largely *because* of unbundling somehow justifies getting *rid* of unbundling.[171] Rather, the greater the reliance of current retail competition on unbundled loops, the greater the need to continue to require unbundling.[172]

What ACS's petition fails to acknowledge, in other words, is that the relevant analysis must be *forward-looking*. The proper question is: What will happen to retail competition in Anchorage if ACS is suddenly free to cease offering UNE loops or to cease offering them at regulated rates? Presumably, ACS does not engage in this inquiry because the only reasonable conclusion – that forbearance will reduce competition and

---

[169] *See Id.* ¶¶ 81-86, 97-102.

[170] ACS Petition at 4-17.

[171] *Omaha Forbearance Order* ¶ 110 ("In the Omaha MSA, where retail competition often is based on the use of Qwest's facilities, eliminating the requirement to provide wholesale access to Qwest's loops . . . is likely to result in a reduction of the very competition Qwest relies on to justify granting its Petition [for forbearance from, *inter alia*, loop unbundling].").

[172] *See id.* ¶¶ 61-83.

harm consumers – gravely undermines their petition. As the following sub-sections explain, eliminating the core unbundling provisions of the 1996 Act at this point in time would *not* increase consumer welfare. Instead, it would simply reproduce ACS's pre-1996 monopoly control over last-mile access – the very feature that the 1996 Act was meant to eliminate. And because of the RCA's intervening retail price deregulation, discussed above, ACS could exploit its re-acquired monopoly position in ways never before possible.

1. The 1996 Act Was Designed To Eliminate ILECs' Control Over Bottleneck Facilities and To Deny Them the Ability To Raise Rivals' Costs.

The 1996 Act constitutes a "pro-competitive, de-regulatory national policy framework" meant to displace traditional retail rate regulation.[173] "Indeed the Supreme Court has emphasized that Congress's passage of the Act represented 'an explicit disavowal of the familiar public-utility model of rate regulation … in favor of novel ratesetting designed to give aspiring competitors every possible incentive to enter local retail telephone markets, short of confiscating the incumbents' property.'"[174]

In implementing these principles, Congress recognized that "it is unlikely that competitors will have a fully redundant network in place when they initially offer local service, because the investment necessary is so significant."[175] To prevent the existing network owners from excluding competition, Congress intended that "[s]ome facilities

[173] S. Rep. No. 104-230, at 1 (1996) (Conf. Rep.).

[174] *TRRO* ¶ 51 (quoting *Verizon Comms. v. FCC*, 535 U.S. 467, 489 (2002) ("*Verizon*")).

[175] S. Rep No. 104-230, at 148; see also *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd 15499, 15510 (¶¶ 14-15) (1996) ("*Local Competition Order*").

and capabilities . . . will likely need to be obtained from the incumbent local exchange carrier as network elements pursuant to new Section 251."[176] In addition to requiring incumbents to provide UNEs at cost-based rates, Congress also established the Section 271 checklist for former Bell Companies.[177] As interpreted by the Commission and affirmed by the D.C. Circuit, these requirements place an additional obligation on BOCs to unbundle, *inter alia*, loops, transport, and switching at just, reasonable, and non-discriminatory prices.[178] Moreover, as the Commission recently conceded in the *Omaha Forbearance Order*, "impairment determinations . . . sometimes are under-inclusive,"

---

[176] S. Rep No. 104-230, at 148; *See generally Omaha Forbearance Order* ¶ 76 ("One of Congress's primary goals in the 1996 Act was the creation of competitive local exchange and exchange access markets. To foster such competition, Congress gave new market entrants, which in 1996 lacked sufficient economies of scale and scope to compete effectively in the local exchange and exchange access markets, the right to compete with the incumbent LEC in these markets by leasing at cost-based rates key components (*i.e.*, UNEs) of the incumbent LEC's own telecommunications network. Under this approach, a high degree of regulatory intervention may initially be required in order to generate competition among direct competitors in a situation where one carrier owns the telecommunications network that will be used to provide service to a single pool of customers."); *see also Verizon* at 503 n.20 ("a policy promoting lower lease prices for expensive facilities unlikely to be duplicated reduces barriers to entry (particularly for smaller competitors) and puts competitors that can afford these wholesale prices (but not the higher prices the incumbent LECs would like to charge) in a position to build their own versions of less expensive facilities that are sensibly duplicable.") (cited by *TRRO* ¶ 51); *Local Competition Order* ¶ 679 ("Congress recognized in the 1996 Act that access to the incumbent LECs' bottleneck facilities is critical to making meaningful competition possible. As a result of the availability to competitors of the incumbent LEC's unbundled elements at their economic cost, consumers will be able to reap the benefits of the incumbent LECs' economies of scale and scope, as well as the benefits of competition.").

[177] *See* 47 U.S.C. § 271(c)(2)(B).

[178] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications* Capability, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (¶¶ 649-67) (2003) ("*TRO*"), affirmed in relevant part by *United States Telecom Association v. FCC*, 359 F.3d 554, 588-90 (DC Cir. 2004) ("*USTA II*").

meaning that competitors cannot always obtain at TELRIC prices all of the network elements necessary to compete effectively.[179]

Congress paid special attention to the price at which incumbents would offer UNEs – after all, even before 1996, potential entrants had access to last-mile special access products at "just and reasonable" tariff rates.[180] But Congress recognized that those products and their "just and reasonable" rates had not induced the proper level of competitive entry, so it provided for § 251(c)(3) unbundling. The Commission recently affirmed in the *TRRO* that this obligation was "intended as an *alternative* to [special access] services, available at alternative [cost-based] pricing."[181] Moreover, the Commission has also reaffirmed that because of the under-inclusiveness of the Commission's impairment determination, the requirement of unbundling at "just, reasonable, and non-discriminatory" rates is also critically important to ensuring competitive entry.[182] As discussed in greater detail below, however, in Anchorage, Section 251(c)(3) is the only means of ensuring the availability of these elements because the incumbent is not a former Bell company and therefore is not subject to the Section 271 checklist requirements.

---

[179] *Omaha Forbearance Order* ¶ 104 ("When the Commission established its impairment determinations, it did so at a level designed to provide incentives for self-provisioning competitive facilities, rather than based on a finding that in all cases self-provisioning of competitive facilities is economically feasible. As a result, the Commission's impairment determinations necessarily sometimes are under-inclusive. In other words, it sometimes is not feasible for a reasonably efficient competitive carrier economically to construct all of the facilities necessary to provide a telecommunications service to a particular customer despite not being impaired under the Commission's rules without access to such facilities.")

[180] *TRRO* ¶ 51.

[181] *Id.* (emphasis in original).

[182] *Omaha Forbearance Order* ¶¶ 103-110.

In the language of the economic and antitrust literature, Section 251 unbundling at cost-based pricing is necessary to solve the well-recognized vertical effects problems caused by monopoly control of bottleneck facilities – the facilities, "such as the local loop . . ., that are most difficult for entrants to replicate promptly."[183] As Dr. Sappington explains in his attached declaration, because of what is known as the "one monopoly rent" theorem, an entity with monopoly control over a bottleneck facility that is used as an input in a distribution chain typically "can recover all [the] monopoly profit available in that chain."[184] In other words, an unregulated monopoly at the wholesale level will result in retail prices and terms equivalent to those that would prevail in a monopoly at the retail level.

The explanation for this "'widely accepted' (albeit 'counterintuitive')"[185] principle is that a firm with control over a necessary input to a retail product has essentially unlimited ability to "raise its rivals' costs" and thereby determine the prevailing retail price.[186] It is in the monopolist's self-interest to charge its retail rivals just enough for the wholesale input so that the rivals must charge a monopoly retail price.

[183] *Local Competition Order* ¶ 696; *see also USTA II*, 359 F.3d at 561 ("The most obvious candidates for . . . obligatory [unbundling under § 251(c) are] the copper wire loops historically used to carry telephone service over the 'last-mile' into users' homes"). The Supreme Court has noted the close conceptual relationship between the provisions of the 1996 Act addressing bottleneck facilities and the concept of "essential facilities" in antitrust doctrine. *See AT&T v. Iowa Util. Bd.*, 525 U.S. 366, 388 (1999).

[184] Sappington Decl. ¶ 17; *see also Town of Concord, Mass. v. Boston Edison Co.*, 915 F.2d 17, 23 & Appendix A (1st Cir. 1990) (Breyer, C.J.) ("'[T]here is but one maximum monopoly profit to be gained from the sale of an end-product.'") (quoting P. Areeda & D. Turner, 3 Antitrust Law ¶ 725b at 199 and citing R. Bork*, The Antitrust Paradox* 229 (1978) ("Vertically related monopolies can take only one monopoly profit"); R. Posner & F. Easterbrook*, Antitrust* 870 (2d ed. 1989) ("There is only one monopoly profit to be made in a chain of production.")).

[185] *Town of Concord*, 915 F.2d at 23.

[186] Sappington Decl. ¶¶ 11-23, 87-96, 101-102.

Alternatively, the monopolist may charge even more for the input, so that rivals must exit the market (because they cannot match the prevailing monopoly price), thereby leaving the entire retail market to the incumbent monopolist. In either event, the monopolist will extract the full monopoly rent for each unit sold. And, even more important, the prevailing retail price will be the monopoly price, meaning that consumer welfare will be far lower than in a competitive market.

The Commission has long recognized that the "raising rivals' costs" and "one monopoly rent" principles are essential to understanding the local exchange market and, in particular, the market for local loops.[187] It has noted, for example, that "[a] carrier may be able to unilaterally raise prices by increasing its rivals' costs or by restricting its rivals' output through the carrier's control of an essential input, such as access to bottleneck facilities, which its rivals need to offer their services."[188] Similarly, it has observed that "[a] carrier can raise prices profitably and sustain them above competitive levels, and thereby exercise market power, … by increasing its rivals' costs or restricting its rivals'

[187] *Local Competition Order* ¶ 368 ("[T]he local loop is the most formidable entry barrier to the local exchange market and has the strongest bottleneck characteristics of any network element."); *see also SBC-AT&T Order* ¶ 55; *Verizon-MCI Order* ¶ 55. The Commission has also frequently discussed the closely-related issue of incumbents using their monopoly control over existing networks to impose a "price squeeze" on competitors. "A price squeeze exists when (1) a firm operates as a seller of both retail and wholesale offerings, (2) one or more companies relies on the firm's wholesale offerings to compete with the firm on the retail level, and (3) the difference between the retail prices for the service at issue and the firm's price for the wholesale input – if any – is too narrow to allow its retail competitors to cover their costs by providing service in the retail market." *TRRO* ¶ 59 n.159. The only difference between the classic price squeeze discussed in the *TRRO* and the situation here is that there is no limit (for the most part) on retail prices, meaning that a monopolist can force its retail rivals to raise their prices to the monopoly level, rather than force them out of the market entirely.

[188] *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements; 2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules*, 18 FCC Rcd 10914 (¶ 5 n.10) (2003).

output through the control of an input that is necessary for the provision of service."[189] The following section explains why these explanatory principles demonstrate that forbearance will empower ACS to increase its revenues at the expense of Anchorage customers.

2. Granting Forbearance Will Give ACS Nearly Unlimited Ability to Raise GCI's Costs.

The forbearance ACS seeks would allow it either (1) to refuse outright to lease UNE loops to GCI, or (2) to offer GCI UNE loops at whatever price ACS chooses. Under either option, the result will be monopoly prices in the Anchorage local services market and reduced consumer welfare.

Outright Refusal To Offer Unbundled Loops. It seems likely that if ACS receives the forbearance it seeks, it will choose simply to refuse to lease UNE loops of any sort to GCI. After all, if ACS intended to continue to offer loops, but not at TELRIC prices, it would have sought forbearance from only Section 252(d)(1) and not from Section 251(c)(3) as well. Moreover, because ACS is not an RBOC, it is not covered by

[189] *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market; Market Entry and Regulation of Foreign-Affiliated Entities*, 12 FCC Rcd 23891 (¶ 144) (1997) ("*FCC Foreign Participation*"). The Commission also has noted that "[f]irms with market power in an 'upstream' input market can engage in discrimination in a 'downstream' end-user market by favoring one downstream entity at the expense of its competitors. When the upstream firm possesses market power, the downstream competitors have few, if any, alternative sources for the upstream input. We find that the relevant input markets … generally include … local access facilities …". *Id.*, 12 FCC Rcd at 23952 (¶ 146). The Commission identifies "price discrimination, non-price discrimination, and price squeeze behavior" as "three anticompetitive strategies" a vertically-integrated ILEC with market power could employ to "cause harm to competition … ." *Id.,* 12 FCC Rcd at 23952 (¶ 146). Thus, an ILEC with dominant control over key inputs can employ many anticompetitive policies (not just the one illustrated here) to raise its rivals' costs and thereby harm retail customers.

Section 271's independent obligation to provide unbundled loops, transport, and switches at just, reasonable, and non-discriminatory rates.

For the reasons given above, if GCI cannot lease UNE loops it may have to withdraw in the near term from providing facilities-based service to roughly 70% of its current lines.[190] Besides the immediate loss of revenue, the harm to GCI's brand perception will be immense. As noted above, GCI has worked assiduously to convince Alaskan customers that it can provide the same or better quality service as the incumbent ACS[191] – even to the point of offering free trips to customers in appreciation for their willingness to remain on GCI waiting lists. Moving a large number of customers to resale, or being unable to serve them entirely, would cause serious harm to GCI's accumulated goodwill.

The loss of revenue caused by the end of unbundled loops will also severely compromise GCI's ability to continue with its plan to build cable-based last-mile facilities.[192] As noted above, GCI currently believes that retrofitting its own existing last-mile facilities for residential customers is in its commercial best interest.[193] But this

[190] *Cf. Omaha Forbearance Order* ¶ 104 ("In addition, even when it is economically feasible for a reasonably efficient competitor to construct such facilities, 'the construction of local loops generally takes between six to nine months absent unforeseen delay.' In order to provide service to customers, competitive LECs therefore may require wholesale access to [the ILEC's] network on a temporary basis while they construct their own facilities to their customers' premises. If carriers lacked wholesale access to [the ILEC's] network elements in such cases, they sometimes would not be able to provide service to that customer. The record contains no evidence to indicate that such an outcome would be a rare occurrence.") Here of course, for reasons specific to Alaska, the time to construct loops may be much longer than six to nine months. *See generally* Section III.B above.

[191] *See* Section II.A above.

[192] Borland Decl. ¶¶ 27-49; *see also* Zarakas Decl. ¶¶ 12-13, 32-33.

[193] *See* Section III above; *see also* Zarakas Decl. ¶¶ 9-10, 32-33.

calculation reflects specific expectations about consumer goodwill (which feeds into the expected revenue payoff for constructing facilities) and also about future revenue.[194] Being forced to stop serving a large number of current customers would obviously change the calculations on both counts. And needless to say, discouraging facilities-based competition would be immensely perverse in light of the goals of the 1996 Act and the Commission's longstanding interest in designing its unbundling rules to provide competitors with the incentive to build facilities where economically feasible.[195]

As for customers, the Commission's recent *Omaha Forbearance Order* makes quite clear that the loss of unbundled loops would constitute a serious blow to consumer welfare. The Commission specifically refused to remove the legal obligation to offer unbundled loops in *any* Omaha wire center. As the Commission explained, "[g]ranting … forbearance from the application of Section 251(c)(3) on the basis of competition that exists only due to Section 251(c)(3) would undercut the very competition being used to justify the forbearance, and we decline to engage in that type of circular justification."[196]

Instead, the Commission specifically affirmed that Qwest must continue to offer unbundled loops, switches, and transport under Section 271 at just, reasonable, and non-discriminatory prices.[197] If unbundling was necessary in the Omaha market, where cable facilities-based competition is far more mature than in Anchorage, it is surely necessary here. Equally important, if GCI were to radically curtail its service to existing customers,

---

[194] *See* Borland Decl. ¶ 27-49.

[195] *TRRO* ¶ 35.

[196] *Omaha Forbearance Order* ¶ 68 n.185.

[197] *Id.* ¶ 100-110.

Anchorage customers would also cease to benefit from the many technical and service improvements described above that GCI has brought to the local marketplace.[198]

ACS suggests that the continued availability of resale under Section 251(c)(4) will allow GCI to continue to compete even if it cannot obtain unbundled loops.[199] This claim is entirely foreclosed by the *Omaha Forbearance Order*, in which the Commission declined to forbear from unbundling at regulated prices regardless of the availability of resale.[200] The claim is also plainly disproved by the history of competition in Anchorage. As discussed above, when ACS raised its retail prices in 2001, the resale-based competitor (AT&T Alascom) was forced to raise its rates as well.[201] Only GCI's UNE-based price discipline was able to return prices to competitive levels. The clear implication of this example – as well as basic economic logic – is that ACS will move quickly after receiving forbearance to raise its retail prices to the monopoly level that maximizes ACS's net revenue. Indeed, because the RCA is poised to deregulate retail prices for most services, ACS will have no problem raising its rates to the monopoly level. The net losers will be consumers.

Equally important, forcing GCI to move to a resale-based model would turn back the clock on competition in Anchorage in other ways as well.[202] To begin with, it would mean that GCI would no longer serve customers using its own switch. Instead, GCI would use ACS's switch and thus be forced to rely on ACS for basic customer service

---

[198] *See* Section II.A above.

[199] ACS Petition at 35-36.

[200] *Omaha Forbearance Order* ¶¶ 57-83, 100-110.

[201] Tindall Decl. ¶ 13; Borland Decl. ¶ 47; Sappington Decl. ¶¶ 88-90.

[202] Borland Decl. ¶¶ 40-49; Declaration of Lisa Wurts ¶¶ 8-14 ("Wurts Decl."), attached hereto as Exhibit K.

functions, such as E911, 411, number porting, directory records, and so forth.[203] Not only would the transition of such functions from GCI's system to ACS's system consume significant resources without corresponding social benefit,[204] but it would also give ACS substantial control over the quality of service that GCI's retail customers receive. ACS will have both the means and the motive to prefer its own retail customers – in essence reproducing the raising rivals' costs problem, except through quality of service rather than through price.

In addition, forcing GCI to rely on resale would seriously compromise GCI's ability to move forward with its plans to build its own cable-based last-mile facilities for single unit residential customers. To begin with, resale will provide GCI with less revenue per customer than UNE-based service.[205] This overall reduction in revenue will limit an important source of capital that GCI presently uses to finance the construction of its own facilities.[206] Equally important, at the operational level, it will divert capital and administrative resources away from the complex (and pro-competitive) task of transferring UNE-based customers to GCI's cable facilities, and towards complex (but socially wasteful) task of moving UNE-based customers to resale facilities.[207] Taken together, the reduced revenue and radically increased administrative expense will also prevent GCI from spending the money necessary to provide enhanced service (*e.g.*,

---

[203] Borland Decl. ¶ 42.

[204] *Id.* ¶ 41.

[205] *Id.* ¶ 46.

[206] *Id.* ¶ 34.

[207] *Id.* ¶¶ 40-48.

longer hours at retail stores and so forth).[208] This will, in turn, erode consumer goodwill and thus further compromise GCI's business case for building its own facilities. Finally, by raising GCI's operating costs, the move to resale-based service will limit GCI's ability to engage in discounting through bundling. The ultimate losers in each instance will be Anchorage customers.

Refusal To Offer Loops At TELRIC Prices. Even if ACS chooses to offer UNE loops, under the forbearance that ACS seeks, it will be under no legal obligation to offer them at TELRIC or even "just, reasonable, and nondiscriminatory" prices.[209] This would plainly undermine all of the progress that the 1996 Act has made to date in Anchorage, and in fact return consumers to a worse position than ever before.

To begin with, giving ACS unfettered ability to raise GCI's cost of serving roughly 70% of its current lines will lead to monopoly prices for not only those customers, but also ACS's current customers who benefit from the price discipline that GCI has brought to Anchorage. ACS disputes this point, suggesting that it will have an incentive to negotiate reasonable wholesale rates for UNEs even in the absence of any legal obligation to do so.[210] But as the D.C. Circuit has recognized, in the absence of a legal duty to offer unbundled loops pursuant to some pricing standard, incumbents have

[208] *See generally* Tindall Decl. ¶¶ 4-18.

[209] ACS asserts in its petition that its local exchange and exchange access offerings would be subject to Sections 201 and 202 of the Communications Act even if the Commission grants forbearance here. ACS Petition at 36. But ACS does not identify any Commission precedent that mandates this result, nor does it explain how its interpretation is consistent with Section 2(b) of the Communications Act. 47 U.S.C. § 152(b); s*ee generally La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986).

[210] ACS Petition at 34-35.

only an "incentive to set the tariff price as high as possible."[211] In rejecting the incumbents' claim that they would voluntarily provide competitors with the level of access to their networks required by the 1996 Act, the Commission used even stronger language:

> It would be a hideous irony if the incumbent LECs, simply by offering a service, the pricing of which falls largely within their control, could utterly avoid the structure instituted by Congress to, in the words of the Supreme Court, "give aspiring competitors every possible incentive to enter local retail telephone markets, short of confiscating the incumbents' property."[212]

The Commission's *Omaha Forbearance Order* reaffirms and synthesizes the aforementioned principles. It requires unbundling with Section 271 pricing for some wire centers and unbundling with Section 252 (d)(1) pricing for others precisely because the incentives of a free market would *not* be sufficient to provide competitors with the level of access to the ILEC's network demanded by the 1996 Act.[213]

To the extent that there are remaining price caps (as for basic local telephone service to residential and single-line business users through 2010), ACS can use its control over the price of unbundled loops to subject GCI to a "price squeeze." As the *TRRO* explains, "[a]n incumbent [with control over loops] would have substantial incentive to raise prices to levels close to or equal to the associated retail rate, creating a

[211] *USTA II,* 359 F.3d at 576.

[212] *Verizon*, 535 U.S. at 489.

[213] Nor will ACS have an incentive to offer these bottleneck facilities at cost-based rates in order to gain at least a fair portion of wholesale (if not retail) revenue from the line, as was the case in the *Omaha Forbearance Order*. *Omaha Forbearance Order* ¶ 81. Here, because there is not full facilities-based competition, ACS can simply charge supra-competitive wholesale prices, and thereby obtain the full monopoly rent at the wholesale level. There is literally no other "game in town" to which competitors can turn for last-mile connections.

'price squeeze' and foreclosing competition based on use of the tariffed wholesale input."[214]

As for non-price factors, ACS's control over GCI's costs will also return the Anchorage markets to the days of monopoly control. If GCI begins to gain market share by providing new services or better terms, ACS can simply raise the price of its unbundled loops so that GCI must raise its price to where its service is no longer competitive with ACS's. In a similar fashion, ACS can prevent GCI from offering the bundled services packages that Anchorage consumers demand – as soon as GCI experiences some success in the bundled services market, ACS can simply force it to raise its rates and relinquish any strategic advantage it has gained. Simply put, forbearance, as requested by ACS, would puts in its hands the tools to control retail prices in the Anchorage markets.

IV. THE PETITION FAILS EACH PRONG OF THE STATUTORY TEST FOR FORBEARANCE.

Pursuant to Section 10 of the 1996 Act, the Commission may only grant forbearance from enforcement of a particular regulation or provision if it determines that:

> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations . . . are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
>
> (3) forbearance from applying such provision or regulation is consistent with the public interest.[215]

---

[214] *TRRO* ¶ 59.

[215] 47 U.S.C. § 160(a).

Moreover, in applying the third prong of the test, "the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services."[216]

---

[216] *Id.* § 160(b). Section 10(d) also specifies that "the Commission may not forbear from applying the requirements of Section 251(c) . . . until it determines that those requirements have been fully implemented." 47 U.S.C. § 160(d). The Commission recently issued a blanket finding that "Section 251(c) is 'fully implemented' for all incumbent LECs nationwide." *Omaha Forbearance Order* ¶ 53. Specifically, the Commission concluded that Section 251(c) becomes "fully implemented" on the day the Commission's rules implementing the Section become effective. *Id.* GCI believes this is a cramped and unnatural reading of the provision particularly as applied to ILECs such as ACS that did not undergo a Section 271 review: The test for full implementation should be a substantive inquiry into whether the incumbent is actually in full compliance with the Section 251 requirements (much like the Commission's Section 271 approval process), not a formalistic inquiry into whether rules were issued.

At a textual level, the Commission's interpretation makes little sense. Congress directed the Commission to "establish regulations to implement" Section 251 within six months of the passage of the Act. 47 U.S.C. § 251(d)(1). If Congress had believed these rules could be "*fully* implemented" at the moment they were simply "implemented," then Section 10(d) would serve little purpose. After all, the Act also gives the Commission up to 15 months to decide forbearance petitions, *id.* § 160(c), meaning that Section 251(c) (under the Commission's cramped interpretation) would by definition be "fully implemented" long before any forbearance petition addressing Section 251(c) could ever come due. In other words, the Commission's interpretation reads the term "fully" out of the statute, and also renders Section 10(d) toothless.

At a policy level, the Commission's interpretation is equally unreasonable. As noted above, Congress's purpose in creating the 1996 Act was to give competitors meaningful access to incumbents' networks. The purpose of the "fully implemented" language in Section 10(d) is plainly to ensure that competitors have received what Congress intended before the Commission entertains the inevitable raft of forbearance petitions from incumbents. This is a distinctly different inquiry (one focused specifically on markets in transition) than the generic three-prong analysis. The D.C. Circuit, in *Association of Communications Enterprises v. FCC*, 235 F.3d 662, 666 (D.C. Cir. 2001), expressly affirmed this commonsense view in 2001 when it held that the Section 251(c) provisions were not then "fully implemented" and thus that forbearance was not appropriate. Indeed, the Commission conceded the point at that time. *Id.*

Now, four years later, the Commission reverses itself with barely any explanation, sweeping together markets that underwent a Section 271 review with those that did not. In doing so, it frustrates the plain purpose of Section 10(d) and instead allows incumbents

The D.C. Circuit and the Commission have made clear that forbearance is permissible "only if all three prongs of the test are satisfied."[217] Moreover, the burden of proof rests squarely on the petitioning party, which must demonstrate "with specificity why [it] should receive relief under the applicable substantive standards."[218] That burden should be especially high here because the Commission has already found nationwide that CLECs are impaired without access to unbundled loops and other UNEs (such as inside wiring and 911 access) from which ACS now seeks forbearance.[219]

In light of these substantive standards, the Commission cannot grant ACS's defective forbearance petition. First, ACS has simply failed to present any case for forbearance from UNEs other than DS0 loops, let alone a case with the specificity the FCC has required. And second, even with respect to DS0 loops, the petition suffers from a number of logical and factual errors, most prominently the failure to acknowledge and

---

to seek forbearance *before* sustainable competition has been achieved. The harm in the present matter is especially pronounced because ACS, as a non-BOC incumbent, has never been subject to the Commission's independent review of its Section 251 compliance through the Section 271 approval process.

[217] *Petition For Forbearance From E911 Accuracy Standards Imposed On Tier III Carriers For Locating Wireless Subscribers Under Rule Section 20.18(H)*, Order, 18 FCC Rcd 24648, 24653 (¶ 12) (2003) ("*E911 Petition*"); *see also Cellular Telecomms. & Internet Ass'n v. FCC,* 330 F.3d 502, 509 (D.C. Cir. 2003) ("*CTIA*") ("The three prongs of § 10(a) are conjunctive. The Commission could properly deny a petition for forbearance if it finds that any one of the three prongs is unsatisfied.")

[218] *E911 Petition* ¶ 24 (holding that "[t]he standards for granting relief in the forbearance context" are no lower than in the waiver context); *Tucson Radio, Inc. v. FCC*, 452 F.2d 1380, 1382 (D.C. Cir. 1971) (burden of proof is on waiver petitioner); *see also E911 Petition* ¶ 12 ("[I]f the evidence in the record before the Commission does not establish that all three conditions for forbearance are satisfied, a petition for forbearance must be denied.").

[219] *See TRO* ¶ 94; *Cf. Petition of SBC Communications Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services*, Joint Statement of Commissioners Michael J. Copps and Jonathan S. Adelstein, 20 FCC Rcd 9361, 9373 ("[A] petitioner seeking forbearance from key provisions of the Act . . . bears a heavy burden under Commission precedent.").

address the fact that forbearance from Sections 251(c)(3) and 251(d)(2) would give ACS unregulated control over a bottleneck facility. As the *Omaha Forbearance Order* makes clear, access to unbundled loops at regulated prices remains necessary to protect competition, even in local markets with advanced facilities-based competition. Indeed, after careful consideration of the issue in both the *TRRO* and the *Omaha Forbearance Order*, it remains true that the Commission has *never* released an incumbent LEC from the obligation to provide competitors with access to loops at regulated prices. And the *Omaha Forbearance Order* also makes clear that, in markets where facilities-based competition is not yet fully mature (as in Anchorage), the regulated loop price should remain the TELRIC-based price.

A. ACS Presents No Arguments to Support Forbearance with Respect to Subloops, Inside Wire, NIDs, Access to 911, OSS, DS1 Loops, and High-Capacity Loops and Dark Fiber.

Although ACS frames its Petition as one for forbearance from unbundling requirements for all UNEs,[220] it fails to make any case for relief from unbundling requirements for UNEs other than DS0 residential market loops. Indeed, ACS acknowledges that mass market loops represent "the most significant area of relief ACS is seeking."[221] As a result of ACS's near-exclusive focus on such loops, ACS has failed to carry its burden of proof with respect to subloops, inside wire, NIDs, access to 911, OSS, DS1 loops, and high-capacity loops and dark fiber. The Commission must therefore deny ACS's petition with respect to these UNEs.

---

[220] ACS Petition at 1.

[221] *Id.* at 25; *see also id.* at 12 (characterizing UNE loop relief as "[t]he core of this petition" and stating that relief sought is "fundamentally loop unbundling").

1. Multiunit Premises Subloops

In its *Triennial Review Order*, the Commission specifically and separately considered the issue of impairment with respect to subloops used to access multiunit premises. As the Commission found in the *TRO* Order:

> Because of their prior exclusive access incumbent LECs have first-mover advantages with respect to access to customers in multiunit premises. Requesting carriers face many barriers in accessing customers in multiunit premises, including a general prohibition against facilities-based access; prohibitive sunk costs associated with rewiring a building to serve potentially only a single customer; the refusal for reasonable access to the existing premises wiring; or the refusal to allow installation of a carrier's own new wiring."[222]

Moreover, the Commission recognized, subloops to gain access to multiunit premises "are extremely time-consuming and expensive to duplicate on a pervasive scale and self-provisioning can be prohibitively costly."[223] Likewise, "the loop itself can be overwhelmingly difficult for competitors to self-deploy due to the sunk and fixed costs associated with entry."[224] The Commission therefore concluded, "[f]or all requesting carriers, *especially carriers constructing facilities-based networks,* the ability to access subloops at, or near, the customer's premises in order to reach the infrastructure in those premises where they otherwise would not be able to take their loop the full way to the customer, is critical."[225]

ACS comes forward with no evidence to contradict the Commission's and show that GCI and other CLECs are not impaired with respect to subloops used to access multiunit premises. Absent such a showing, forbearance from access requirements with

---

[222] *See TRO* ¶ 348.

[223] *Id.*

[224] *Id*.

[225] *Id*. (emphasis added).

respect to such subloops should not be granted, as access remains necessary to serve the purposes identified by the Commission in the *TRO Order*. Denying forbearance is also necessary to ensure that customers in multiunit premises continue to benefit from competition, and are not subjected to higher rates and more onerous terms and conditions for service in violation of Section 10(a)(1) and (2) of the Act.

2. Inside Wire and NID

The same is true with respect to the inside wire and NID UNEs. As the Commission found in the *Triennial Review Order*:

> The economic impairment competitive CLECs face, generally, with respect to most loops is exacerbated through the outright barriers they face in gaining access to customers from owners of multiunit premises. This impairment is especially problematic in situation where competitors are able to construct and provision a local loop using their own facilities all the way to a customer premises, yet still remain unable to reach the end user in that premises. If competitors can only get as far as the building or property line MPOE with their own facilities because they are prohibited from installing their own customer premises wiring to reach a customer a that premises, the incumbent LEC's inside wire subloop or NID may be the exclusive means of reaching an end user. Often there is no alternative inside wiring other than the incumbent LEC's available at the premises.[226]

ACS offers no explanation why the Commission's conclusion does not continue to be true in Anchorage. Nor does ACS counter the careful consideration that gave rise to the inside wire UNE.[227] Accordingly, pursuant to, *inter alia*, Section 10(a)(3), the Commission should summarily deny as anticompetitive and contrary to the public interest

---

[226] *TRO* ¶ 351.

[227] *See generally Promotion of Competitive Networks in Local Telecommunications Markets*, 15 FCC Rcd 22983 (2000). Even if GCI can ultimately gain access to the basement, that still does not permit GCI to get to the customer's unit, particularly in business buildings that are not already wired for cable television.

ACS's request for forbearance with respect to Section 251(c)(3) as it pertains to these elements, as well as Section 51.319(b) and (c) of the Commission's rules.[228]

3. Access to 911/E911

ACS likewise fails to offer any evidence of the availability of alternatives to its unbundled 911 and E911 databases. Consequently, the Commission should deny ACS's request for forbearance from unbundling and related pricing obligations with respect to Section 51.319(d)(4)(i)(B) of the Commission's rules.

4. Operations Support Systems

ACS makes no case as to why it is entitled to forbearance from the obligation to unbundle its operations support systems. To the extent any unbundling obligations remain at all – which they must because ACS fails to provide any basis for forbearance as to virtually all elements other than mass market DS0 loops – access to operations support systems is critical. Such access is necessary to ensure that UNEs are provisioned in a not unreasonably discriminatory manner. Thus, ACS's request for forbearance from the requirement to unbundled operations support systems must fail under Section 10(a)(1).[229]

5. DS1 Loops

In its review of competitive carrier facilities within its Anchorage service area, ACS does not even discuss DS1 UNE loops,[230] essentially disregarding the Commission's careful treatment of these facilities in the *TRRO*.[231] In that *Order*, the Commission found that CLECs deploying competitive fiber "face large fixed and sunk

---

[228] ACS's request also fails under Section 10(a)(1) and (2).

[229] ACS's request also fails under Section 10(a)(2) and (3).

[230] ACS Petition at 15.

[231] *TRRO* ¶ 149.

costs in deploying competitive fiber, as well as substantial operational barriers in constructing their own facilities."[232] As a result of these obstacles, the Commission recognized that "LECs do not typically construct fiber loop facilities at lower capacity levels, such as DS1 or DS3."[233] The Commission recognized, as well, that construction of local loop facilities cannot happen overnight, generally requiring "six to nine months absent unforeseen delay."[234]

Despite the Commission's conclusions, ACS offers no factual support for its requested forbearance. None of ACS's declarants, for example, addresses the market for high capacity business services, including private line, delivered over high capacity DS1 loops. This omission is particularly glaring because the Commission recognized in the *TRRO* that competitive carriers generally have "used competitive facilities to serve customers at the DS1 capacity . . . only over higher-capacity facilities already used to serve one or more other customers within the same building,"[235] highlighting the importance of unbundled DS1 loops to serve customers where such facilities are not already in place. In the face of this record, ACS's failure to provide any explanation of

---

[232] *Id*. ¶ 150. The Commission elaborated: "The costs of loop construction are fixed, meaning that they are largely independent of the particular capacity of service that a customer obtains at a particular location. For fiber-based loops, the cost of construction does not vary significantly by loop capacity (*i.e.*, the per-mile cost of building a DS1 fiber loop does not differ significantly from the cost to construct a DS3 or higher-capacity fiber loop), but such costs do vary based on the length of the loop. The most significant portion of the costs incurred in building a fiber loop results from deploying the physical fiber infrastructure into underground conduit to a particular location, rather than from lighting the fiber-optic cable." *Id.*

[233] *Id*. ¶ 150

[234] *Id*. ¶ 151. In Anchorage, due to the limited construction season, the six to nine months of construction time necessary to extend last-mile facilities could require as many as 18 calendar months.

[235] *Id.* ¶ 167.

why it is entitled to forbearance with respect to DS1s loops condemns ACS's request with respect to those loops.[236]

6. High-Capacity Loops and Dark Fiber

ACS asserts that relief from unbundling requirements is appropriate for high-capacity loops and dark fiber because "[n]o CLEC has ever purchased DS-3 or dark fiber loops from ACS."[237] This absence of demand to date, however, does not justify forbearance. Instead, it counsels against forbearance, which would simply limit any possible emergence of competition using high-capacity loops and dark fiber. The Commission should not accept ACS's invitation to use an absence of competition now to ensure an absence of competition in the future.

B. Section 251(c)(3) and 252(d)(1) Requirements Remain Necessary to Ensure that Rates for Both UNEs and Retail Services are Just, Reasonable, and Not Unjustly or Unreasonably Discriminatory.

ACS seeks to persuade the Commission, based on only the most superficial evidence and analysis, that even though GCI has built its effective competitive presence in Anchorage retail markets based upon UNEs, the Commission can nonetheless remove ACS's obligation to provide access to UNEs – particularly DS0 loops – at TELRIC rates without harming competition or consumers in Anchorage markets. In fact, the opposite is true: forbearance as ACS requests will allow ACS to charge unjust and unreasonable UNE rates and subject retail consumers in all markets to unjust and unreasonable monopoly rates.

[236] ACS's request also violates Section 10(a)(1) and (2).

[237] ACS Petition at 15.

First, ACS improperly rests its forbearance request on an overbroad market definition. As Dr. Sappington describes, and as the Commission itself has recognized on numerous occasions, including in the recent *Omaha Forbearance Order,* the telephony market is composed of numerous product markets.[238] At minimum, the Anchorage product market must be separated into the market for the types of voice telephony services sold to residential and small businesses, and the market for enterprise services, as the Commission did in the *Omaha Forbearance Order*.[239] To accurately reflect the current state of competition in Anchorage, the Commission should go further, and recognize the distinction, arising in part from the predominantly residential location of GCI's cable plant, between the residential and small business markets in Anchorage.[240] Furthermore, as Dr. Sappington describes, the mass market for voice telephony may appropriately be split between MDUs and non-MDUs, which present different competitive environments.[241] In addition, it is appropriate to recognize the pronounced heterogeneity among enterprise customers. For example, enterprise customers are not a single product market, but occupy several product markets, one of which is medium businesses, which typically purchase fractional or full DS1 based services for both voice

---

[238] Sappington Decl. ¶¶ 25-31.

[239] *Omaha Forbearance Order* ¶22; Sappington Decl. ¶ 31.

[240] *See supra* Section III.A.

[241] Sappington Decl. ¶ 29.

and data private line services.[242] Finally, there is the large enterprise market that buys much higher capacity services.[243]

Nor is the Anchorage markets a unified geographic market. As this Commission made clear in the *SBC-AT&T Order* and *Verizon-MCI Order*, as well as the *Omaha Forbearance Order*, the relevant geographic market for all local services, whether mass market, enterprise or special access, is the customer location, which then can be aggregated into areas facing similar competitive choices.[244] As Dr. Sappington describes, it is clear that all areas of the ACS Anchorage study area do not face the same competitive choices with respect to alternatives to ACS's loops.[245] GCI, for example, is the licensed cable operator in only a portion of the ACS Anchorage study area, not the entire study area.[246] Even with GCI's franchise area, its cable plant is not ubiquitous. Moreover, because GCI – in sharp contrast to the situation considered in the *Omaha Forbearance Order* – is still in the process of deploying its cable telephony service, much of the ACS Anchorage study area that falls within GCI's cable service franchise has not yet been upgraded for cable telephony.[247] Furthermore, to the extent ACS also relies on the presence of GCI's fiber network, that network itself has a limited footprint and does

---

242 Sappington Decl. ¶ 30. As the Commission noted in the *SBC-AT&T Order* and *Verizon-MCI Order*, this market is further composed of separate relevant product markets comprised of different capacity circuits. *See SBC-AT&T Order* ¶ 27 n. 90; *Verizon-MCI Order* ¶ 27 n.89.

243 Sappington Decl. ¶ 28.

244 *See SBC-AT&T Order* ¶¶ 28 (special access), 62 (retail enterprise market), 97 (mass market services); *Verizon-MCI Order* ¶¶ 28 (special access); 62 (retail enterprise market); 98 (mass market services); *Omaha Forbearance Order* ¶ 69 n.186; Sappington Decl. ¶¶ 32-39.

245 Sappington Decl. ¶¶ 32-39, 108-112.

246 *Id.* ¶ 36; Borland Decl. ¶ 28.

247 Sappington Decl. ¶ 36; Haynes Decl. ¶¶ 3-21; Exhibit F.

not provide a competitive alternative throughout the ACS Anchorage study area.[248] For these reasons, ACS's counterfactual effort to treat the Anchorage study area as a single geographic market is misleading, inaccurate, and highly inappropriate.

Finally, and most significantly, ACS wholly ignores the vertical effects of the forbearance that it requests. As addressed by Dr. Sappington, and as discussed above, because GCI's retail competition with ACS still substantially relies on the use of ACS UNE loops, if forbearance were granted, ACS would be free to exercise market power by raising rivals' costs.[249] Through such a strategy, if forbearance were to be granted, ACS could increase not only UNE rates, but also the retail prices for all telephony services within its Anchorage study area to levels that are unjust and unreasonable. ACS presents no evidence to demonstrate that it lacks the ability to engage in such anticompetitive conduct in any of the relevant product and geographic markets within its Anchorage service area. Thus, ACS's request for forbearance must be rejected under Section 10(a)(1).

1. ACS Should Not Be Relieved of its Only Regulatory Obligation to Offer UNEs to Requesting Carriers.

i. The *Omaha Forbearance Order* Precludes Any Finding that Forbearance from Access to UNEs is Warranted in this Case.

ACS's request for forbearance from its obligation to provide access to unbundled loops – *i.e.*, the obligation to make such loops available – must be rejected in light of the Commission's decision in the *Omaha Forbearance Order*. While the Commission made clear that it was not, in the *Omaha Forbearance Order*, adopting any rules of general

[248] *See* Exhibit BB-1, attached to Brown Decl.

[249] Sappington Decl. ¶¶ 11-23, 45-55, 87-96, 101-105, 113-122.

applicability, the Commission's reasoning does not permit the Commission to forbear from Section 251(c)(3)'s basic requirement that ACS make unbundled loops available to requesting carriers.

Although the Commission, in the *Omaha Forbearance Order*, granted Qwest's request from forbearance from Section 251(c)(3), including the obligation to unbundle loops, the Commission did so only while declining to forbear from similar requirements under Section 271(c)(2)(B)(iv) through (vi).[250] As a consequence, Qwest remains under a regulatory obligation to unbundle loops in all parts of the Omaha MSA, including the nine wire centers in which it was granted forbearance from Section 251(c)(3).

Moreover, the grounds on which the Commission rejected Qwest's request for forbearance from Section 271 (c)(2)(B)(iv) through (vi) dictate that the Commission likewise reject ACS's request for relief from the Section 251(c)(3) obligation to make available unbundled loops, switching or transport. In that decision, the Commission recognized that economic barriers to self-provisioning and the length of time necessary to construct local loops required some continuing obligation to make UNEs available to ensure that carriers could continue to provide service while constructing their own last-mile facilities.[251] Here, GCI has only recently begun to deploy its own last-mile facilities, and continued access to UNEs is necessary to allow GCI to continue this effort.[252]

Furthermore, the Commission denied forbearance from the requirement that Qwest make available unbundled loops because it said that the availability of loops and

---

[250] *Omaha Forbearance Order* ¶ 100.

[251] *Id.* ¶ 104.

[252] Borland Decl. ¶¶ 27-49.

the actual and potential competition made possible by the availability of those loops was a basis for its forbearance from the other requirements – principally the pricing requirements – from which it forbore under Section 251(c)(3).[253] Indeed, the Commission specifically relied upon the requirement that Qwest continue to provide unbundled loops, albeit under Section 271, as a basis for rejecting arguments that forbearance would result in consumers facing "risk of duopoly and of coordinated behavior or other anticompetitive conduct."[254] In sum, the Commission rejected Qwest's request to be freed of all requirements to provide unbundled loops specifically because the Commission was concerned that without the competition that unbundled loops provide, "telecommunications services available to consumers might not be offered on just, reasonable and non-discriminatory terms."[255] Here, because ACS is not subject to 271 obligations, the logic of the *Omaha Forbearance Order* requires that ACS's Section 251(c)(3) obligations remain in effect.

Finally, and most significantly, the *Omaha Forbearance Order* does not support relief here because the extent of loop-based competition in Anchorage appears to be less than it was in the Omaha wire centers for which forbearance was granted. In Omaha, Qwest was competing with Cox, which had already substantially built out its network so that it was apparently able to serve an overwhelming majority of customer locations from its cable network within a commercially reasonable period of time. Even putting aside (1) those portions of the business market that cannot be served today using cable plant, and (2) those businesses and residences that do not lie on GCI's cable plant, GCI does not

---

[253] *Omaha Forbearance Order* ¶ 105.

[254] *Id.* ¶ 71.

[255] *Id.* ¶ 103.

have Cox's ability to serve an overwhelming majority of customers. Instead, GCI is in the midst of extensive upgrades that do not currently allow GCI to serve most customers over its own facilities.[256] It is thus indisputable that alternative loop facilities are less fully deployed in Anchorage today than they are in Omaha.

Furthermore, unlike the situation it faced with Qwest, the Commission cannot simply forbear from Section 251(c)(3) as a means for forbearing from TELRIC pricing while relying on Section 271 to maintain a basic unbundling requirement. ACS is not subject to Section 271. Therefore, even to mimic the result the Commission reached in its *Omaha Forbearance Order* – which would itself violate Section 10 as applied to the Anchorage markets – the Commission would have to deny ACS's request for forbearance with respect to Section 251(c)(3) while granting forbearance from Section 252(d)(1)(A)(i)'s requirement that UNE prices be set based on "cost (determined without reference to a rate-of-return or other rate-based proceeding)." Granting such relief is unwarranted here, however, as ACS has neither requested nor justified such additional forbearance.

Thus, there is no way that the Commission could reconcile its reasoning in the *Omaha Forbearance Order* with a grant of the full scope of ACS's request for forbearance from Section 251(c)(3) as to unbundled loops. The *Omaha Forbearance Order* simply precludes any grant of forbearance that would allow ACS to cease offering access to unbundled loops altogether.

---

[256] Zarakas Decl. ¶¶ 7, 12-13, 16.

ii. Forbearance from the Availability of UNEs Would Increase ACS's Ability to Charge Unjust and Unreasonable Prices for Retail Telecommunications Services.

Even apart from the precedent of the *Omaha Forbearance Order*, the Commission must reject ACS's request for forbearance from loop availability requirements pursuant to Section 251(c)(3) because such forbearance would give ACS the ability to raise prices to unjust and unreasonable levels for retail telecommunications services, in violation of Section 10(a)(1). The Commission cannot, as ACS does, ignore the vertical effects of ACS's requested forbearance.

In applying the first prong of the forbearance analysis, the Commission has long recognized that "competition is the most effective means of ensuring that . . . charges, practices, classifications, and regulations . . . are just and reasonable, and not unreasonably discriminatory."[257] While the existence of robust competition at the retail level is an important precondition for finding that the first prong is met, it is far from the end of the inquiry.[258] As the Commission emphasized in the *Omaha Forbearance Order*, the more critical question is whether there are "very high levels of retail competition *that do not rely on [the incumbent LEC's] facilities.*"[259]

---

[257] *Petition of U S WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Service; Petition of US WEST Communications, Inc. for Forbearance; The Use of N11 Codes and Other Abbreviated Dialing Arrangements*, Memorandum Opinion and Order, 14 FCC Rcd 16252, 16270 (¶ 31) (1999) (cited by *Omaha Forbearance Order* ¶ 63).

[258] *See Omaha Forbearance Order* ¶¶ 63-68.

[259] *Id.* ¶ 67 (emphasis added).

The difference here is significant, especially with respect to ACS's request to be relieved of all regulatory obligations to make UNEs available. In the absence of UNEs, GCI would have only two alternatives to serve a customer – extending its own loop facilities to serve that customer or purchasing ACS's retail services for resale.

In any of the product markets for which GCI purchases UNE loops today, ACS's market power would increase were GCI to be limited today to just those two alternatives. With respect to resale, as Dr. Sappington describes and as discussed above,[260] because the prices GCI pays for wholesale resale services are directly pegged to ACS's retail prices, ACS can increase both GCI's costs and the price it seeks to obtain in the retail market by increasing its retail prices. GCI's experience in the Anchorage markets demonstrates that a carrier that relies on wholesale resale is not in a position to exert a strong competitive discipline on ACS's retail prices – particularly compared with a UNE-based provider.[261] If ACS were free to force GCI onto ACS resale products by withdrawing UNEs from the market, ACS would be able to raise its retail rates to unjust and unreasonable levels.

Nor does the potential for GCI to eventually construct its own loop facilities provide a meaningful check on consumer retail rates. As discussed above, the Commission concluded in the *Omaha Forbearance Order* that the *availability* of unbundled elements was necessary to ensure that rates were just and reasonable and not unreasonably discriminatory "even when it is economically feasible for a reasonably efficient competitor to construct such facilities."[262] In so doing, the Commission

---

[260] *See* Section II.B above; Sappington Decl. ¶¶ 89-90.

[261] *See* Tindall Decl. ¶ 13; Sappington Decl. ¶¶ 89-90; Borland Decl. ¶ 47.

[262] *Omaha Forbearance Order* ¶ 104.

necessarily concluded that expected new loop construction would not discipline prices in the period before and during construction.

This conclusion, as Dr. Sappington explains, is fully consistent with the purpose and logic underlying Section 251(c)(3)'s unbundling obligations.[263] Congress intended the Act's competition provisions to replace the need for retail rate regulation, as part of a "pro-competitive, de-regulatory national policy framework."[264] Moreover, UNEs were expressly provided to permit retail competition to arise when alternative facilities were not yet available.[265] Thus, forbearance is not warranted if it permits an ILEC to exercise market power for even a few months while competitive facilities are being built.[266]

ACS's ability, in the absence of a UNE unbundling requirement, to engage in a raising rivals' cost strategy to exercise market power in the retail market is even stronger in the business market, particularly with respect to medium sized business locations, than it is in the residential and small business markets. As discussed in the Declaration of Gary Haynes, these locations are generally served today using unbundled loop facilities and cannot, using current standard cable telephony, be served using cable plant.[267] Moreover, as the Declarations of Blaine Brown and William Zarakas make clear, customers with locations of less than two DS1s in volume cannot economically be served by fiber, and even many customers that purchase more DS1s to a single location cannot

---

[263] Sappington Decl. ¶ 13.

[264] S. Rep. No. 104-230, at 1 (1996) (Conf. Rep.)

[265] *See id.* at 148; Sappington Decl. ¶ 13.

[266] *Sappington Decl.* ¶¶ 15-16.

[267] Haynes Decl. ¶¶ 20-23.

be served economically using fiber.[268] By withdrawing DS0 and DS1 UNEs from the market, ACS would relegate GCI entirely to wholesale resale services to serve the medium and large enterprise customers that cannot be served using cable plant.[269] This, in turn, would allow ACS to raise resale prices when it raises its retail rates. Moreover, because these medium and large sized enterprise locations are generally served through individually negotiated contracts, it would particularly easy for ACS to exercise its market power, with little check from GCI.[270]

This is true regardless of GCI's retail market share. In evaluating market power, the Commission in the *Omaha Forbearance Order* looked beyond the mere retail market share upon which ACS fixates. Instead, the Commission recognized that the degree of demand and supply elasticity present in a market affects the ability of competitors in that market to compete. As explained in Section III.D above, GCI faces unique limits on its ability to build facilities, including Anchorage's brief construction season and paucity of seasonal workers. In the medium to large enterprise market, technology and cost are significant further constraints on supply, as services demanded by these customers cannot feasibly be offered using GCI's cable facilities. These services, instead, must be

---

[268] Brown Decl. ¶¶ 11-19; Zarakas Decl. ¶¶ 15-16, 38-44, 48.

[269] It is important to note that for a significant number of medium to large enterprise locations, GCI provisions services using unbundled DSL-qualified DS0 loops, rather than UNE DS1s. GCI does so by adding its own electronics to the DS0 loop. These loops serve a separate product market – the medium to large enterprise locations – than the DS0 loops that GCI leases today to serve residential and small business customers. These latter DS0 loops can be replaced by cable telephony, but the DS0 loops to which GCI adds its own electronics to provide high capacity service cannot feasibly be replaced with cable telephony. Thus, in evaluating ACS's request for forbearance, DS0s used for this purpose must be evaluated under Section 10(a)(1) separately from DS0s used in the mass market.

[270] *See* Sappington Decl. ¶ 115.

provided over UNEs or fiber.[271] And, as Mr. Zarakas demonstrates, it is not economically feasible for GCI, or any reasonably efficient competitor to ACS, to replace fractional and whole DS1s with fiber until the demand at that customer's location exceeds, at minimum, 2 DS1s and often more.[272] For these reasons, GCI cannot serve these customers or feasibly expand its capacity to do so without access to UNEs.[273] Moreover, as Dr. Sappington points out, because these medium to large enterprise location customers are generally served through individually negotiated contracts rather than general tariffed rates, these customers are particularly vulnerable to anticompetitive behavior by ACS.[274]

Even in the residential and small business product markets, GCI supply elasticity is limited. First, GCI cannot upgrade cable plant to provide telephony service in areas where it is not even authorized to provide cable service and does not have cable plant. ACS's request for forbearance must therefore be denied with respect to all wire centers, or portions thereof, that lie outside GCI's franchised cable area, including the Girdwood, Hope and Bird-Indian wire centers.[275] Likewise, many small business customers are not passed by GCI's cable plant, as GCI cable predominantly serves residential areas. Further, even for those customers that are on GCI's cable plant, the evidence makes clear that GCI could not simply flip a switch and convert residential and small business

---

[271] Haynes Decl. ¶ 22.

[272] Zarakas Decl. ¶¶ 15-16, 38-44.

[273] This is true whether GCI serves these customers with DS0 UNEs to which GCI adds its own electronics or with DS1 UNEs.

[274] Sappington Decl. ¶ 115.

[275] *See* Exhibit E attached hereto. The cable operator in Girdwood is Eyecom, a subsidiary of the TelAlaska, another Alaska ILEC. Borland Decl. ¶ 28.

customers that are being served by UNEs to GCI's own facilities.[276] The Commission's assessment of ACS's ability to constrain competition should take these and other limits on GCI's supply elasticity into account.

iii. ACS Has Not Shown that Application of Sections 251(c)(3) and 252(d)(1) is Unnecessary.

ACS's arguments that continued application of Sections 251(c)(3) and 252(d)(1) is not necessary to ensure that retail prices in Anchorage markets are just, reasonable, and not unreasonably discriminatory are not persuasive.[277] *First*, ACS's interpretation of the Commission's recent *Section 271 Broadband Order*[278] is specifically rejected by the *Omaha Forbearance Order.* ACS suggests that the *Section 271 Broadband Order* stands for the general proposition that forbearance is appropriate where there is sufficient competition in the retail market even without sufficient competition in the wholesale market.[279] In fact, that *Order* suggests only that (1) sufficient full *facilities-based* competition in the retail market can justify forbearance, if (and only if) (2) unbundling requirements at the wholesale level create significant "investment disincentives."[280]

---

[276] *See generally* Section III.A-III.C above.

[277] ACS Petition at 20-23, 29-37.

[278] *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c); SBC Communications Inc.'s Petition for Forbearance under 47 U.S.C. § 160(c); Qwest Communications International Inc. Petition for Forbearance under 47 U.S.C. § 160(c); BellSouth Telecommunications, Inc., Petition for Forbearance under 47 U.S.C. § 160(c)*, Memorandum Opinion and Order, 19 FCC Rcd 21496 (2004) ("*Section 271 Broadband Order*").

[279] ACS Petition at 21-22.

[280] *See Section 271 Broadband Order* ¶ 22 (emphasizing that the retail competition for high speed Internet access is chiefly between facilities based DSL and cable modem providers); ¶¶ 24-25 (describing in detail the reduced incentives to building new facilities caused by the BOCs' Section 271 unbundling obligations); *see also Omaha Forbearance Order* ¶ 106 (characterizing the *Section 271 Broadband Order's* holding as relying on (1) the existence of "numerous intermodal broadband competitors" and (2) the fact that

Here, neither half of the *Section 271 Broadband Order*'s logic applies. As to the first half, retail competition in Anchorage is not yet substantially full-facilities based, but rather currently relies, in large part, on access to unbundled loops at regulated prices. This is precisely why access to unbundled loops at TELRIC prices remains necessary to ensure just, reasonable, and nondiscriminatory prices (as was the case in 15 of the *Omaha Forbearance Order's* wire centers in Omaha). As for the second half, the facilities at issue here are *legacy* facilities – not the fiber facilities at issue in the *Section 271 Broadband Order* – and ACS has not even *alleged* that it is facing a disincentive to invest in upkeep of these legacy facilities. Indeed, the *Omaha Forbearance Order* makes this exact finding:

> The reasoning that formed the basis of the Commission's decision to forbear from applying the Section 271 network access requirements to certain of the BOCs' broadband facilities does not extend to Qwest's legacy elements. The supply market for legacy services is quite different from the supply market for broadband services. As explicitly recognized in Section 706, it is important for this Commission to remove investment disincentives that apply to *broadband* services in order to encourage the construction of next generation facilities to customers nationwide. In contrast, the policies of Section 706 do not apply to already-constructed legacy elements.[281]

Second, ACS's scattershot arguments about why it will continue to offer just, reasonable, and nondiscriminatory retail rates are either expressly foreclosed by the *Omaha Forbearance Order* or are unreasonable on their face. To begin with, the *Omaha Forbearance Order* makes clear that, contrary to ACS's promises,[282] an incumbent will *not* have an incentive to offer loops at just, reasonable, and nondiscriminatory prices – or

---

"Section 271 unbundling obligations create disincentives for the BOCs to make substantial incentives in . . . new fiber technologies").

[281] *Omaha Forbearance Order* ¶ 107.

[282] ACS Petition at 43-45.

even at all – if left to its own devices. That is why the Commission declined to offer relief from Section 271 unbundling in any wire center and from Section 251 unbundling in wire centers where the competitor does not have last-mile facilities covering a significant portion of end users in the wire center. ACS's citation to the 1995 decision that declared AT&T non-dominant when it still had 60% of the long-distance market is beside the point[283] – here ACS actually has 85% of the relevant market, which is last-mile connections to customer premises.[284] And it is control over that bottleneck facility that would allow ACS to raise GCI's costs so as to produce monopoly prices.[285]

ACS also suggests that GCI will "exert disciplinary effects" in the local service market merely because it has *announced* that it intends to build its own facilities to serve residential customers, even though it has not yet done so.[286] ACS's bald assertion makes no sense. For the reasons explained above, an incumbent with control over bottleneck loop facilities will be able to raise its rivals' costs until the rivals actually build facilities, regardless of what the rivals have announced they intend to do. Certainly, the *PCIA*

---

[283] *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, 3307-08 (¶ 68) (1995).

[284] *See* Exhibit I, attached to Zarakas Decl.

[285] ACS also cites *Worldcom v. FCC*, 238 F.3d 449, 459-60, and *TRO* ¶ 259, for the proposition that the Commission can grant deregulation based on imperfect current competition. ACS Petition at 22 n.104. But the *Worldcom* decision says only that an imperfect measure of competition can withstand deferential judicial review – this does not mean the Commission should not strive for more accurate measures where possible. *Id.* And the *TRO* language that ACS cites says that competition was sufficiently advanced to decline to unbundle (under Section 251) the high frequency portion of copper loops. But that decision applies a totally different standard for deregulation than applies to forbearance under Section 10.

[286] ACS Petition at 30.

Order that ACS cites does not support its claim.[287] That *Order* merely says that "licensees do not exert any disciplinary effect in their markets until after they announce their intentions to commence operations, identify the services they intend to offer, and begin soliciting business" – it does not imply the indefensible extension drawn by ACS that a mere announcement can substitute for actually building facilities.[288]

Nor is it correct to suggest that wireless and VoIP providers offer meaningful intermodal competition in Anchorage that will eliminate ACS's ability to charge unjust and unreasonable prices, even if ACS were to withdraw UNEs from the market. As discussed above, and as the FCC concluded in the *SBC-AT&T* and *Verizon-MCI Orders,* there is no evidence that "over-the-top" VoIP is in the same product market as the local exchange and exchange access services ACS and GCI currently provide. This particularly true because there does not appear to be any "over-the-top" VoIP provider that offers service using Anchorage telephone numbers.[289] With respect to CMRS, ACS

---

[287] *Personal Communications Indus. Ass'n's Broadband Personal Communications Servs. Alliance Petition for Forbearance for Broadband Personal Communications Servs.*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 16857 (1998) ("*PCIA Order*") (cited by ACS Petition at 30).

[288] *Id.* ¶ 22. ACS is also incorrect to assert that GCI made any general representation to the RCA that "markets can be deemed competitive even before facilities-based competition exists throughout the geographic area." ACS Petition at 30. In truth, GCI simply argued that it is appropriate to deem a local exchange market "competitive" for state law purposes governing retail price regulation where "competitive entry may not serve 100% of the customers within an exchange area." *See* GCI Reply Comments at 3-4, attached to ACS Petition as Exhibit H. But this is a far cry from the proposition that ACS puts forth here – namely that the wholesale market in Anchorage is competitive even though the incumbent controls the last-mile facilities currently used to serve over 85% of the market. *See* Exhibit I, attached to Zarakas Decl.

[289] ACS's expert baldly asserts that "there is no question that customers are substituting VoIP . . . for ACS local exchange and access services in escalating numbers." Blessing Stmt. at 13. He bases this conclusion on two *Wall Street Journal* articles and a 2003 J.D. Power & Associates report. *Id.* These sources address the use of VoIP across the entire

presents no serious argument that these services are a substitute for the services that GCI provides over UNE loops to businesses. And ACS likewise presents no evidence to show that the limited degree to which CMRS can substitute for wireline local service will significantly constrain the prices that ACS could charge to residential customers for primary line service in the absence of UNEs.[290] In other words, there is simply no serious argument that these service modes provide any meaningful price discipline on wireline local service that makes UNE unbundling superfluous.[291]

Third, ACS is also mistaken, for two distinct reasons, to assert that the RCA's deregulation of retail pricing cuts in favor of granting forbearance here.[292] To begin with, if the RCA grants ACS's request for nondominant retail treatment under new Alaska rules, the RCA will have done so relying on the strength of retail competition as it exists today under the current unbundling rules. If ACS receives the relief it seeks here and withdraws UNEs from the market, that competition would evaporate. The RCA's conclusion that retail competition (based in large part on UNEs) is sufficient today plainly cannot lead the Commission to eliminate the very retail competition that provided the original justification for price deregulation. As the Commission explained in the

---

United States, not in Anchorage where, as noted above, there are *no "over-the-top" VoIP providers*.

[290] Sappington Decl. ¶¶ 106-107; *SBC-AT&T Order* ¶ 90 n.277.

[291] ACS's expert also baldly asserts that "there is no question" that customers are substituting CMRS services for ACS service. Blessing Stmt. at 13. As with his analysis of VoIP, this statement is based in part on a report (by the FCC) that addresses the entire country, not Anchorage. *Id.* Even more important, the analysis fails to disclose that ACS is itself a leading wireless provider in Alaska and thus is poised to benefit from, rather than be hurt by, an increase in wireless use. ACS also fails to offer any evidence for its suggestion that wireless loops are a widely-available and/or feasible substitute for UNE loops in Anchorage. *See* ACS Petition at 35.

[292] *Id.* at 33.

Omaha Forbearance Order: "In the Omaha MSA, where retail competition often is based on the use of Qwest's facilities, eliminating the requirement to provide wholesale access to Qwest's loops . . . is likely to result in a reduction of the very competition Qwest relies on to justify granting its Petition."[293] The same logic applies to the RCA's retail price deregulation.

Moreover, if the RCA grants ACS's request for nondominant retail treatment (which GCI has not opposed), the retail price deregulation resulting from that treatment would actually magnify ACS's ability to raise retail prices to unjust, unreasonable, and discriminatory levels if ACS receives the forbearance it seeks. As noted above, forbearance from loop unbundling will give ACS the ability to raise GCI's costs (by forcing GCI onto wholesale resale services) to a point where GCI is charged the monopoly wholesale rate and ACS is thereby permitted to raise its rates to monopoly levels without fear that GCI could undercut its prices. If, at that point, ACS has already been granted nondominant status by the RCA, it will not be subject to requirements to file cost support with its tariffs, and thus will be able to raise rates largely unchecked by state regulation.

Accordingly, there is no basis for granting ACS's request for forbearance from Section 251(c)(3)'s requirement that it make unbundled loops and other network elements available to GCI and other requesting carriers in any of the Anchorage markets.

2. ACS is not Entitled to Independent Relief from UNE Pricing Standards.

As discussed above, ACS does not seek forbearance from Section 251(d)(1)'s UNE pricing standards, and the FCC rules issued thereunder, separately from Section

[293] *Omaha Forbearance Order* ¶ 110.

251(c)(3)'s requirement that UNEs be made available. As the Commission explained in the *Omaha Forbearance Order*, it "is under no statutory obligation to evaluate [a forbearance petition] other than as pled."[294] Moreover, in that *Order* the Commission specifically denied the petitioner "relief from other regulations that apply to dominant carriers" on the ground that it "fail[ed] to identify specific regulations or to explain how they meet the Section 10 criteria."[295] Thus, because ACS has failed to show that forbearance from Section 251(c)(3) will not lead to unjust, unreasonable or unreasonably discriminatory rates, terms and conditions, the Commission need not consider separately whether it should forbear from Section 251(d)(1) even if it does not forbear from Section 251(c)(3). However, to the extent ACS's petition is reinterpreted to include an independent request for forbearance from Section 251(d)(1) and the FCC's implementing rules, such forbearance also must be denied under Section 10(a)(1).

i. Rate Structure Rules are Necessary to Ensure Rates are Just and Reasonable.

Forbearance must be denied because the Commission's UNE rate structure rules, its rule precluding the assessment of access charges on UNEs, and its rule precluding variations in UNE rates based on customer class or the services that the requesting carrier seeks to provide remain necessary to ensure that prices in Anchorage markets are just, reasonable, and not unreasonably discriminatory. In its *Local Competition Order*, the FCC established UNE rate structure rules to implement Section 251(c)(3)'s requirement that rates be just and reasonable, and 252(d)(1)'s requirement that rates be cost-based.[296]

---

[294] *Id.* ¶ 61 & n.161.

[295] *Id.* ¶ 16.

[296] *Local Competition Order* ¶ 743.

When it adopted these rules, a significant purpose was to "prevent incumbent LECs from inefficiently raising costs in order to deter entry."[297] ACS presents no evidence to show why it should be excused from these requirements.

ACS does not, for example, explain why it should be permitted to charge usage based rates for dedicated loops for which cost does not vary with usage.[298] Nor does ACS present any reason why it would be just and reasonable for ACS to impose an access charge on a purchaser of an unbundled loop.

By contrast, the Commission has found that its rate structure and no access charge rules are necessary to ensure that rates are just and reasonable. For example, the Commission has specifically found that recovery of recurring costs in a non-recurring charge is not just and reasonable.[299] Likewise, the Commission has expressly forbidden ILEC differentiation of UNE charges based on the class of service (i.e., residential v. business service) or type of service offered by a requesting carrier.[300] ACS provides no explanation why the Commission should now reach a different conclusion with respect to the Anchorage markets.

Furthermore, continued application of the Commission's rate structure and no access charge rules is necessary to prevent ACS from exercising market power more effectively. If ACS could charge different rates for different classes of service, it could

---

[297] *Id*. These rules are codified in Sections 51.503(b)(first clause), (c), and 51.507-509 of the Commission's rules. 47 C.F.R. §§ 51.503(b), (c), 51.507-509 (Section 51.503(b)(1) addresses forward looking cost-based pricing, which is addressed separately in Section IV.D.2 below). The Commission also adopted Section 51.515(a), which precluded ILECs from assessing access charges on UNE elements. 47 C.F.R. § 51.515(a). The remainder of Section 51.515 is obsolete.

[298] *Cf.* 47 C.F.R. § 51.507(a), (b).

[299] *Local Competition Order* ¶ 746.

[300] 47 C.F.R. § 51.503(c); *Local Competition Order* ¶ 766.

better drive up prices in those product and geographic markets where GCI cannot, within a commercially reasonable time, offer services entirely over its own facilities.[301] Moreover, because these rules only apply to situations in which the parties cannot agree on rates, and do not preclude or override voluntary agreements,[302] continued application of these rules does not prevent any mutually beneficial arrangements. Because ACS's petition fails to show that these rules are not necessary to ensure that rates are just and reasonable, any request for forbearance from these portions of the Commission's FCC's UNE rate structure rules, and Sections 251(c)(3) and 251(d)(2), which they implement, must be denied.

ii. Pricing Rules are Necessary to Ensure Rates are Just and Reasonable.

ACS also fails to demonstrate that rates for UNEs – particularly UNE loops – would remain just, reasonable and not unreasonably discriminatory if the Commission were to forbear from Section 252(d)(1)'s cost-based pricing requirement and the Commission's rules requiring pricing according the forward-looking TELRIC methodology. Just as with the availability of UNEs, if the Commission grants ACS's request for forbearance from TELRIC pricing, ACS will gain the ability to exercise market power by raising GCI's costs and thereby increasing the prices that ACS can charge its own retail customers.

In the first instance, the Commission's *Omaha Forbearance Order* does not compel grant of ACS's petition with respect to TELRIC pricing. The Commission made clear that its Omaha decision did "not reach the situation where the incumbent LEC's

---

[301] Sappington Decl. ¶ 115.

[302] *Local Competition Order* ¶ 752.

primary competitor uses unbundled network elements (UNEs), particularly unbundled loops, as the primary vehicle for serving and acquiring customers in the relevant market."[303] That is precisely the circumstance presented here.

Moreover, as discussed previously, the Omaha, Nebraska market presented a very different situation. Unlike GCI in Anchorage, Cox in Omaha had already substantially deployed its cable plant and deployed its cable telephony service throughout the nine wire centers in which the FCC granted forbearance. In contrast, GCI is in the midst of upgrading its network and deploying cable telephony, and cable telephony in Anchorage remains a nascent service. Consequently, GCI depends on UNE loops to offer service to the residential, small business, and medium to large enterprise markets, including acquiring customers, serving those customers and, wherever possible, transitioning customers to GCI facilities.[304]

As Dr. Sappington sets forth, simply requiring ACS to provide UNEs, as Qwest was required to do, will not protect Anchorage consumers against unjust and unreasonable charges.[305] Even if it were required to continue to provide unbundled network elements, ACS has the incentive and ability to price those elements at a level designed to extract ACS's single monopoly profit. By so doing, ACS would not only increase the revenue it obtains from GCI, but also increase the revenue it obtains from its own retail customers. Thus, without a TELRIC pricing requirement, basic economic principles make it clear that ACS will be able to charge unjust and reasonable rates not

---

[303] *Omaha Forbearance Order* ¶ 2 n.4.

[304] *See generally* Section III.A-III.C above.

[305] Sappington Decl. ¶¶ 17-23, 45-54, 87-99.

just for the UNEs it offers to competitors, but also for the retail services it offers to consumers

Finally, ACS's suggestion that pricing relief is appropriate because its TELRIC UNE rates are "below cost" simply does not hold water.[306] While ACS's TELRIC rates are below the NECA reported unseparated average loop cost of $24.62,[307] that loop cost reflects embedded cost, and therefore is not relevant here.[308] As the Commission explained in its *Local Competition Order*, pricing UNEs on the basis of ILEC embedded costs would create an anticompetitive pro-ILEC bias.[309] Despite ACS's insistence to the contrary, TELRIC rates are fully compensatory for an efficient incumbent LEC.[310]

The Commission recently confirmed this principle in the *Triennial Review Order* when it clarified that the appropriate cost of capital must reflect the risks of a competitive market and any unique risks associated with new services that might be provided over certain types of facilities,[311] and permitted accelerated depreciation to reflect the decline in an asset's "value that would be anticipated in the competitive market TELRIC

---

[306] In any event, if ACS feels it is entitled to a different TELRIC price, the appropriate remedy is not forbearance from TELRIC pricing requirements.

[307] NECA reported that ACS of Anchorage had unseparated annual loop costs of $295.41, or monthly costs of $24.62. *Universal Service Fund Data: NECA Study Results*, File USF2005LC05.xls in USF05R04.ZIP at http://www.fcc.gov/wcb/iatd/neca.html.

[308] By way of comparison, ACS sought a monthly UNE rate of $25.88 for a DS0 loop in recent arbitration. (*In the Matter of the Petition by GCI Communications Corp. d/b/a General Communication, Inc., and/b/a GCI for Arbitration Under Section 252 of the Telecommunications Act of 1996 with the Municipality of Anchorage d/b/a Anchorage Telephone Utility a/k/a ATU Telecommunications for the Purpose of Instituting Local Exchange Competition*, Docket U-96-089, ACS of Anchorage, ACS-ANC and GCI Interconnection Agreement (proposed), Part C, Attachment 1 at 27, filed May 12, 2004).

[309] *Local Competition Order* ¶ 705.

[310] Sappington Decl. ¶ 63.

[311] *TRO* ¶¶ 680, 683

assumes."[312] ACS's UNE loop rates in Anchorage were set after the *TRO* took effect, with the RCA implementing the provisions on cost of capital and depreciation.[313] There can be no argument, then, that ACS's current UNE rates are not fully compensatory.

For all of these reasons, ACS has failed to demonstrate that the cost-based pricing requirements of Section 252(d)(1) and the Commission's TELRIC pricing rules, codified in 47 C.F.R. §§ 51.503(b)(1), 51.505, and 51.511, are not necessary to ensure that rates both for UNEs and for retail services are just, reasonable and not unreasonably discriminatory. To the contrary, the evidence shows that these critical statutory and regulatory protections remain necessary to protect the competition – and thus the market discipline on retail rates – that has developed in the Anchorage markets.

C. Section 251(c)(3) and 251(d)(1) Requirements Remain Necessary to Protect Consumers.

ACS correctly states that the analysis for the second prong of the test – whether the challenged regulation "is necessary for the protection of consumers" – is largely identical to the first.[314] Accordingly, the fact that forbearance from the loop unbundling regulations will give ACS the ability to control retail prices by raising GCI's costs provides a clear reason that the petition fails the second prong. ACS also asserts under this prong that GCI's success in gaining customers in 2001, when ACS raised its prices, indicates that GCI could do the same today if ACS were to raise prices.[315] But the 2001

---

[312] *Id.* ¶ 689.

[313] In its arbitration order, the RCA used a Weighted Average Cost of Capital of 13.89%. GCI has appealed the RCA's order because it believes that the RCA's calculation of the cost of capital was flawed and unreasonable. GCI's Opening Brief in *GCI v. Regulatory Commission of Alaska*, Case No. A05-03CV (D. Alaska Oct. 7, 2005).

[314] ACS Petition at 23-24; *Omaha Forbearance Order* ¶¶ 73, 108.

[315] ACS Petition at 38-39.

episode actually illustrates quite clearly why access to unbundled loops is *essential* to allowing GCI to provide continued price discipline. As noted above, GCI was able to keep its prices low (unlike AT&T Alascom, a resale-based service provider) because it had access to UNE loops and its own switch and transport facilities. If GCI had been forced in 2001 to pay whatever price ACS demanded for loop access, or to use Section 252(c)(4) resale, then it would *not* have been able to keep its prices at then existing levels. Instead, ACS would have succeeded in forcing all carriers to raise retail prices – to the detriment of consumers.

D. Forbearance From Loop Unbundling Is Not in The Public Interest and Would Not Promote Competition

In applying the third prong of the forbearance, the Commission has developed two additional lines of analysis for assessing the effect of forbearance from unbundling on the public interest and on competition.

First, the Commission explained in the *Omaha Forbearance Order* that it must weigh the costs and benefits of unbundling obligations.[316] As the Order explains, "a high degree of regulatory intervention may initially be required in order to generate competition among direct competitors in a situation where one carrier owns the telecommunications network that will be used to provide service to a single pool of customers."[317] Though this process concededly imposes "a number of costs," the *Order* concludes that the costs of requiring unbundled loops at regulated prices do not outweigh the benefits in any wire center, regardless of the degree of facilities based competition.[318]

[316] *Omaha Forbearance Order* ¶ 76-77.

[317] *Id.* ¶ 76.

[318] *Id.* ¶¶ 109-110

The costs of requiring unbundled loops at TELRIC prices only outweigh the benefits "once the local exchange markets . . . are sufficiently competitive" as in the nine wire centers in Omaha.

None of Anchorage's wire centers is sufficiently competitive to warrant forbearance. Equally important, there is no issue here of ACS's incentives to invest because, as noted above, this petition involves "legacy services" and not "broadband services" (which are supplied over GCI's cable plant).[319] ACS attempts to revive this line of argument by asserting that "GCI's incentive to transition to its own network will be inhibited as long as it continues to profit from using ACS's network."[320] However, GCI has shown that it is moving as quickly as possible to develop new facilities.[321] Certainly, ACS has not provided any evidence that GCI has slowed down its transition to DLPS because of the UNE rules.[322]

Second, the Commission explained that "[o]nce the benefits of competition have been sufficiently realized and competitive carriers have constructed their own last-mile facilities . . . , we believe that it is in the public interest to place intermodal competitors on an equal regulatory footing by ending unequal regulation of services provided over different technological platforms."[323] Here, of course, competition is not currently between two competitors with different modes of providing last-mile access. Instead, it is between an incumbent that owns the bottleneck loops and a competitor that is building,

[319] *Id.* ¶ 107.

[320] ACS Petition at 41.

[321] *See* Section III.A-III.D above; Sappington Decl. ¶¶ 118-120.

[322] *Id.*

[323] *Omaha Forbearance Order* ¶ 78.

but has not yet fully built, telephony-capable residential last-mile loops and that cannot economically build last-mile facilities to reach many businesses and MDUs. Under the standard announced by the *Omaha Forbearance Order*, the time is not yet ripe for regulatory parity.

Of particular importance, the Commission noted in its analysis of the regulatory parity issue that because of Cox's facilities-based presence in Omaha, the incumbent LEC "will be subject to very strong market incentives to ensure that its network is used to optimal capacity . . . in order to minimize revenue losses resulting from customer defections to Cox's service."[324] But in Anchorage, the fact that GCI has not yet built last-mile facilities to a large percentage of end users ensures that ACS does *not* have comparable incentives to offer reasonable prices. Instead, for all the reasons provided above, if granted forbearance, ACS will have the means and the motive to either eliminate loop access altogether or to charge supracompetitive prices for loop access.

Moreover, the Commission cannot, as ACS would have it do, ignore the fact that there are distinct product markets and geographic markets and that not all product and geographic markets can be served using the cable telephony on which ACS relies. Cable telephony, for example, cannot be used to serve a small business customer in an area not served by cable, and the presence of competition in the residential market will only to a limited extent constrain ACS's ability to raise rates and reduce competition for small business customers. Similarly, medium enterprise locations – those above eight lines but less than a DS3 in capacity at a single location – are a distinct market from residential and small business markets and cannot reasonably be lumped together with the residential

[324] *Id.* ¶ 81; *see also* ACS Petition at 43-45.

and small business markets. When these distinct markets are analyzed, it is even more clear that ACS cannot show that forbearance is pro-competitive and in the public interest.

Finally, in conducting its public interest inquiry, the Commission cannot ignore the significant social waste that would occur if GCI were forced in a short period of time to eliminate its use of UNE loops. Doing so would require GCI to switch virtually all of its current UNE loop customers to resale within whatever time window the Commission permitted. As the Declaration of Gina Borland explains, this process would be extremely expensive for GCI, harm the quality of service GCI provides to its customers, and compromise GCI's transition to the process of upgrading its cable plant.[325] Most importantly, GCI and its customers will incur these costs without creating any social value – only ACS will benefit from the process. An expenditure of social resources without any offsetting social gain is the very definition of an action that is not in the public interest.

1. Forbearance Only As To GCI Is Not a Reasonable Alternative

ACS also suggests that the Commission, in the alternative, could provide ACS with forbearance from Section 251(c) only as to GCI.[326] This idea is absurd on its face and without any support in precedent or economic policy. Because GCI is the only purchaser of the loops in question, if ACS's request for general forbearance does not pass muster, as a matter of logic, the analysis cannot change if applied to GCI only. The effects on prices, consumers, and the public interest will be identical under either general or GCI-specific forbearance.

---

[325] *See generally* Borland Decl. ¶¶ 40-49; *see also* Wurts Decl. ¶¶ 8-12.

[326] ACS Petition at 48-49.

V. CONCLUSION

Consistent with the goals of the 1996 Act, GCI has brought the enormous benefits of retail competition to the Anchorage markets. GCI is currently working to extend this competition by constructing its own last-mile facilities, but this process is far from complete and GCI continues to rely on unbundled loops to offer facilities-based service to Anchorage customers in all markets. As a result of ACS's control over this bottleneck facility, removing unbundling requirements would enable ACS to raise its rivals' costs and otherwise stifle the very retail competition that ACS relies on in its request for forbearance. Granting ACS's request would also run counter to the Commission's recent *Omaha Forbearance Order*, in which the Commission carefully maintained requirements that the incumbent make unbundled loops available at regulated rates. Finally, ACS has failed to satisfy even a single prong of the statutory test for forbearance. For these reasons, ACS's Petition should be denied.

Respectfully submitted,

________/s/________________

Tina Pidgeon
Vice-President –
Federal Regulatory Affairs
General Communication, Inc.
1130 17th Street, N.W., Suite 410
Washington, D.C. 20036
(202) 457-8812

John T. Nakahata
Brita D. Strandberg
Bruce L. Gottlieb
Christopher P. Nierman
Harris, Wiltshire & Grannis LLP
1200 Eighteenth Street, N.W.
Washington, D.C. 20036
(202) 730-1300

Counsel for General Communication, Inc.

Filed: January 9, 2005